Supreme Court of the United States

OCTOBER TERM, 1907

No. 454

THE STEWART DRY GOODS COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND [illegible] BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX [illegible] OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED [illegible], 1907.

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JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

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[fols. a & 1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

THE STEWART DRY GOODS COMPANY, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, and HENRY M. CLINE, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Jan. 24, 1931

The plaintiff, The Stewart Dry Goods Company, a corporation organized under the laws of Kentucky, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

[fol. 4] I

The plaintiff, The Stewart Dry Goods Company, is now and at all times herein mentioned it was, and since the year 1892 it has been, a corporation duly created, organized and existing under the laws of the Commonwealth of Kentucky, with its principal office and only place of business in the city of Louisville, Kentucky, and a citizen and resident of the Commonwealth or State of Kentucky, and an inhabitant of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and

at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Seldon R. Glenn are inhabitants of the [fol. 5] Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall [fol. 6] be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiff and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, or from instituting any prosecution against the plaintiff or any [fol. 7] of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Ken-

tucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for [fol. 8] each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of [fol. 9] chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House

Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 10] V.

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose, of said House Bill 111 was changed by amendment by the Com-

mittee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

[fol. 11] VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:.

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or [fol. 12] ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined

herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under [fol. 13] the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from

such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

[fol. 14] "§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby

authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made [fol. 15] taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or [fol. 16] any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full dis-

closure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improve-[fol. 17] ments for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time with- two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one

suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act [fol. 18] provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The plaintiff herein, for nearly forty years continuously last past, and its predecessors in interest since 1846, have been engaged in conducting one retail store in Kentucky, the same being located in Louisville, Kentucky, wherein it handles and sells, exclusively at retail, merchandise of the following general character:

(1) Piece dry goods, such as silks, velvets, dress goods, wash goods, linens, etc.

(2) Laces, ribbons, notions, toilet goods, books, art goods, etc.

(3) Handkerchiefs, hosiery, gloves, underwear, millinery, corsets, shoes, etc.

(4) Women's ready-to-wear garments.

(5) Men's and Boys' furnishings, etc.

(6) House furnishings.

[fol. 19] (7) And also operates two lunch rooms, in which it sells lunches.

Plaintiff is not engaged in manufacture of any kind. It has never owned or operated or conducted any other store than the one, which for 84 years past has been located in Louisville, Kentucky, and for more than twenty years past has been located at the corner of Fourth and Walnut Streets in that city.

Plaintiff conducts in its retail store what is known as a department store, embracing approximately 70 separate departments, in which separate departments it sells at retail merchandise of various kinds, of which the following are illustrations:

Silks and velvets,
Pianos,
Gloves,
Toys and Sporting Goods,
Women's Hosiery,
Chinaware,
Books,
Millinery,
Upholstery,
Muslin Underwear,
Furniture,
Rugs and Carpets,
Men's Furnishings,
Shoes.

Each of said departments is operated by the plaintiff separately from other departments, and plaintiff's books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, in- [fol. 20] cluding its proper proportion of rental, taxes, insurance and all other overhead expense, and the net results of such operation of each department, to the end that plaintiff may determine, after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in Louisville and in

other cities in Kentucky, and the same is true as to each department operated by plaintiff in its retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, and such competition applies not only to the plaintiff's conduct of its store as a whole but as to each unit or department therein.

[fol. 21]

VIII

In addition to the several departments separately conducted by plaintiff itself in its retail store building, plaintiff has for more than 30 years last past leased floor space in its said store to Herbert Tashgian, to whom it furnishes light, heat, janitor and elevator service, storage, billing, credit rating, collection and other like services, all for a valuable consideration expressed in the contract between plaintiff and said lessee, but in all other respects, said lessee conducts for himself his own retail store in his leased space. Said lessee owns and operates in said leased space his own stock for the sale of Oriental rugs. He selects his own stock of goods, and buys them for himself, employs, discharges and pays his own salesmen or assistants, fixes the selling prices of his own goods, pays his own taxes upon his own goods, and in all essential respects manages and conducts his own store as the proprietor thereof, though conducted in the same building as the store of this plaintiff and its various departments.

IX

For many years past, plaintiff has kept its entire capital invested in the retail store conducted by it in Louisville, Kentucky. For nearly 40 years it has been a large taxpayer to the State of Kentucky and the city of Louisville and the County of Jefferson. It has paid all annual ad [fol. 22] valorem taxes levied thereon by competent authority for State, County and city purposes. It has exerted itself with the utmost diligence and prudence to build up

its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiff.

To do this has required of the plaintiff the closest attention to every phase of its business, including the most careful foresight as to the class or style of goods it should stock in its store and in each department thereof to attract the public and to satify its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonable in character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiff has been obliged to expend each year, in the community served by it, [fol. 23] large amounts of money for advertising in newspapers and for trade solicitation by personal letters to its customers, and circulars to the public generally, and has also expended large sums of money in the employment of skilled and competent persons to decorate its shown-windows and make an inviting display of its merchandise in its windows and in its store, and in the purchase of the proper equipment for such purposes. Only by such progressive methods and by the policy of continued fair dealing with the buying public, has the plaintiff been able to build up its business and to take its own proper part in building up its city and State.

Likewise plaintiff has for many years past actively interested itself in all forms of civic, cultural, religious and welfare work carried on in its City and State, and contributed largely of its means and of the time of its officers. Its Vice-President, William B. Pirtle, has been a member of the City Planning and Zoning Commission of Louisville

from its organization, serving without pay, and all its officers and employees have taken their part in public activities.

Plaintiff keeps its money on deposit in banks located in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so.

Plaintiff has more than 500 employes at all times, ranging as high as 750 employes during the holiday trade. It pays them the highest current compensation for services of the kind rendered by them. Two hundred and twenty of [fol. 24] its employes have been with it continuously for more than five years. One of its employes has been with it and its predecessors 63 years. He is virtually a pensioner, and others are actually pensioned by it. Near the end of each calendar year, it gives to each employe a bonus proportioned to services rendered and their duration. Every employe in its service for as much as a year gets a vacation of two weeks on full pay, and every employe in service for as much as six months gets a vacation of one week on full pay.

X

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the State of Kentucky for the calendar year 1930 (not mentioning similar taxes paid for prior years) the following special State licenses, excises, occupational and corporation license taxes:

Corporation License Tax	$977.07
Other License Taxes	31.00
Automobile License Taxes	271.04
Total	$1,279.11

XI

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to [fol. 25] any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-

twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent [fol. 26] upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

XIII

During the calendar year 1930, the total gross retail sales made by plaintiff in all departments conducted by it in its retail store aggregated $3,821,636.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930 (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	22,097.17 Tax
Total tax above computed	$25,147.17
Credits allowed under § 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06

[fol. 27] If to plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, as the defendants herein construe said challenged Act to require (which construction is challenged by plaintiff and by said Tashgian, its lessee, as improper, unwarranted and, moreover, as making the challenged Act, if so construed, void in that respect as a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and likewise violative of the Kentucky Constitution), then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amount to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, and the effect will be to tax the additional sales made by plaintiff's lessee all in the highest bracket of 1 per cent, thus making an additional tax demanded of plaintiff and/or its lessee, by defendants, of $289.29, which is 20 times the amount that such lessee or plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said Tashgian were treated as his own separate retail store and taxed accordingly under said Act.

[fol. 28] XIV

Each of the separate departments conducted by plaintiff in its retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by this plaintiff in the particular department of its store handling or selling that class or line of goods. In no one department conducted by this plaintiff in its retail store do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $250,000, nor do the gross annual sales of any specialized retail store in Kentucky competing with any of the departments in plaintiff's store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against this plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiff are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at [fol. 29] 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of this plaintiff's department competing with said specialized single store are added to its gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of this plaintiff's departments in its retail store.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail mer-

chants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments of its retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under [fol. 30] the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically [fol. 31] all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have gross annual sales in all their stores or departments ag-

gregating more than $400,000, are subject to taxation under said Act, and they constitute a very small class of limited number in Kentucky. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax ex- [fol. 32] ceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of its departments in competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiff's store and thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store, and the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

[fol. 33]

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations [fol. 34] owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by this plaintiff in its retail store and by retail merchants generally throughtout Kentucky and other States, facilities, services and advice in selecting, buying, adver-

tising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by this plaintiff in its retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be [fol. 35] paid therefore, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class [fol. 36] and quality, at similar price, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross

sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence this plaintiff, by reason of its operation of a department store and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the store of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiff's store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff [fol. 37] have, by reason of their advantages, made substantial inroads and encroachments upon the trade of this plaintiff in its various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally

and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one [fol. 38] per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar- increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having [fol. 39] total sales of six hundred thousand dollars; for the next one hundred thousand dol-ars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three

hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar- increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classi- [fol. 40] fication does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars,

[fol. 41] or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising [fol. 42] and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation

under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

[fol. 43]

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested [fol. 44] capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiff and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of this plaintiff and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by this plaintiff and other retail merchants similarly situated and, as far as possible under said Act, to divert trade and custom from the retail stores of this plaintiff and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed at rates very much lower than those exacted [fol. 45] by said Act of this plaintiff and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in uniformity in its application to the persons or occupations taxed thereunder, and it designedly transfers to and imposes upon this plaintiff and all other retail merchants similarly situated an undue proportion and practically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by this plaintiff and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to this plaintiff and other retail merchants similarly situated the equal protection of the laws guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

[fol. 46] XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest [fol. 47] to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against this plaintiff or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against this plaintiff or any of said other retail merchants on whose behalf this suit is brought.

While it is impracticable to bring them all before the Court, plaintiff names herein some of the other retail merchants similarly situated and belonging to the class of retail

merchants doing business in Kentucky, on whose behalf plaintiff brings this suit, as follows:

J. Bacon & Sons.
H. P. Selman Company.
Kaufman-Straus Company.
Herman Straus & Sons Company.
John C. Lewis Company.
Hook Drug Co.
Rodes-Rapier Co.
Louis Appel Co.
Hubbuch Bros. & Wellendorff.
Lemon & Sons.
S. H. Kress & Co.
Great Atlantic and Pacific Tea Co.
Montgomery, Ward & Co.

[fol. 48]

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent. plus 6 per cent. per annum interest, with a further additional penalty of 20 per cent. if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports nec-
[fol. 49] essary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the

defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, [fol. 50] which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13 being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed

by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the [fol. 51] specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiff says that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

[fol. 52] (a) It denies to this plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their

property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to this plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiff and all other retail merchants similarly situated, and in that it taxes this plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, [fol. 53] persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiff and other retail merchants attempted to be

taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

[fol. 54] Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

[fol. 55] XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiff and its officers and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against this plaintiff and its officers and agents the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $23,848.06 as hereinbefore computed and stated, and also to compel this plaintiff and its officers, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against this plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting of $3,209,717.39, upon which, under said Act, a tax would result against this plaintiff of $23,848.06 as hereinabove set out, in addition to the tax of $289.29 hereinabove set out as resulting from the inclusion with plaintiff's gross sales of gross sales made by its lessee, Herbert Tashgian, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to [fol. 56] make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which it has no plain, adequate and complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and un-

constitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

[fol. 57] (3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(4) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10 of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Ac-

counts for a mandamus to compel him to draw his warrant [fol. 58] upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will possibly decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their re- [fol. 59] spective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal Constitution.

Prayer for Relief.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, [fol. 60] from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482 entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail [fols. 61 & 62] merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in

conflict with the provisions of this Act,") be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiff.

Duly sworn to by Robert T. McKim. Jurat omitted in printing.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had

upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, peding the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) For enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, and prose-
[fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or

servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecu-

tion or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 67] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, The Stewart Dry Goods Company, by counsel, and upon its verified Bill of Complaint herein, entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and [fol. 69] (b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the reve-

nue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act; or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been [fol. 71] wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDERS—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges cannot be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect be-

yond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] In United States District Court

Motion to Strike from Bill of Complaint—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise," line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act," line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931

* * * * * * *

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follows:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Febr. 14, 1931

Come the defendants John B. Lewis, Seldon R. Glenn and Henry M. Cline, Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts for the Commonwealth of Kentucky, and for their answer to the Bill of Complaint filed in the above styled action, plead as follows:

I

For answer to paragraph one said defendants admit all of the allegations contained in paragraph one of the bill of complaint.

II

For answer to paragraph two said defendants admit all of the allegations contained in paragraph two of the bill of complaint.

[fol. 78] III

For answer to paragraph three defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum and value of $3,000, exclusive of interest and costs. They deny that this suit is of a civil nature, or is brought in equity for the purpose of enjoining the defendants, or any of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the session Acts of 1930, or for the purpose of enjoining the defendants, or any of them, from requiring of the plaintiff or other taxpayers similarly situated as hereinafter set forth, the reports which said act purports to require of retail merchants as the term "retail merchants," is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, or from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated, or from instituting any

prosecution against the plaintiff or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated for a violation of any of the terms of said Act.

IV

For answer to paragraph four defendants deny that House Bill 111, introduced on January 21, 1930, at the regular session of the General Assembly of Kentucky, which provided by its terms for a license or an excise tax upon each merchant doing business in Kentucky, was introduced as "An act to restrain the unfair competition of [fol. 70] chain stores, and aid of individual merchants in the Commonwealth." They deny that such bill was referred to the Committee on Kentucky Statutes, or that it was reported on as "An Act to restrain the unfair competition of chain stores, and aid of Individual merchants of the Commonwealth." They deny that on each of the second and third readings of said bill it was read by the title, "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth." They deny that upon the third reading of said bill by said title it was passed by the House of Representatives, or that after its passage its title was amended, or that it was enrolled after being reported by the enrollment committee under the title "House Bill 111, An Act to restrain unfair competition of chain stores, and aid of individual merchants in the Commonwealth," or that said bill was voted on, signed, passed or enrolled under any other title than that appearing on the enrolled bill in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herein.

V

For answer to paragraph five defendants do not have sufficient information as to the allegations in paragraph five, and therefore, neither admit nor deny but require strict proof thereof.

VI

For answer to paragraph six defendants admit the allegations contained therein.

VII

For answer to paragraph seven defendants do not have sufficient information as to the allegations contained in [fol. 80] paragraph seven, and therefore, neither admit nor deny but require strict proof thereof.

VIII

For answer to paragraph eight defendants do not have sufficient information as to the allegations contained in paragraph eight, and therefore, neither admit nor deny but require strict proof thereof.

IX

For answer to paragraph nine defendants do not have sufficient information as to the allegations contained in paragraph nine, and therefore, neither admit nor deny but require strict proof thereof.

X

For answer to paragraph ten defendants do not have sufficient information as to the allegations contained in paragraph ten, and therefore, neither admit nor deny but require strict proof thereof.

XI

They deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, public welfare, public morals, or public safety, or which, to any extent whatever, increases any fire or police hazard beyond whatever hazard may appertain to other stores handling similar classes of merchandise with one-twentieth of the sales or any volume of gross sales made by plaintiff.

They deny that Chapter 149, Acts of 1930 General Assembly, is purely a tax measure or that it does not purport to be an exercise of the police power of the State, or that [fol. 81] it does not relate to the public health, or the public morals, or the public welfare or the public safety, or that it does not attempt to regulate any business that is affected with a public interest.

They deny that there is no provisions for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax, or that no standards are set up for the conduct of the business of a retail merchant.

XII

For answer to paragraph twelve defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or that, hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately or designedly or otherwise so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or other retail merchants who are thereunder sought to be taxed the rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that it is in its higher brackets of taxation, confiscatory as to this plaintiff or any others similarly situated.

XIII

For answer to paragraph thirteen defendants deny that during the calendar year of 1930, the total gross retail sales made by plaintiff in all or any departments conducted by it in its retail stores aggregated $3,821,639.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930, (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive.

[fol. 82] They deny that in applying said gross sales, claimed by said defendants to be subject to taxation under Chapter 149, said Acts of 1930, the graduated rates of taxation prescribed by said Act, or deducting the credits allowed by Section 4 of said Act, would produce the following result:

	Tax.
"1/20 of 1% on first $400,000 of sales	$200.00
2/20 of 1% on next $100,000 of sales	100.00
5/20 of 1% on next $100,000 of sales	250.00
8/20 of 1% on next $100,000 of sales	400.00
11/20 of 1% on next $100,000 of sales	550.00
14/20 of 1% on next $100,000 of sales	700.00
17/20 of 1% of next $100,000 of sales	850.00
1% on excess over $1,000,000 of sales	22,097.17
Total tax above computed	$25,147.17
Credits allowed under Section 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06"

They deny that if to the plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amounts to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, or that the effect will be to tax the additional sales made by plaintiff's lessees all in the highest bracket of 1%, thus making an additional tax demanded of plaintiff or its lessee, of $289.29, or that it is 20 times the amount that said lessee of plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said lessee were treated as his own retail store or taxed accordingly under said Act.

[fol. 83] XIV

For answer to paragraph fourteen defendants deny that each of the separate departments conducted by plaintiff in its retail store comes into direct or into any competition with any other specialized individual retail stores in Kentucky dealing mainly or exclusively in any kind or particular class of goods handled or sold by this plaintiff in the particular department of its store handling or selling that class or line of goods.

Defendants not having sufficient information as to the amount of gross annual sales in the departments of plaintiff's retail stores require strict proof as to the allegation in paragraph fourteen herein.

XV

For answer to paragraph fifteen defendants deny that Section 4 of said challenged Act of 1930 contains a provision that in effect, or otherwise, exempts from the payment of any tax thereunder any smaller retail merchants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments in its retail store competing with said retail merchants with the smaller volume of business.

Deny that Sec. 4 of said Act provides in substance, or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereinafter be enacted; that in the case of retail merchants having smaller volumes of sales, such credits are in actual fact or otherwise provided so as to in effect relieve such smaller retail merchants of the payment of any tax whatever under said Act, or in effect provide that the special State license, excise, occupational or corporation license tax exacted from [fol. 84] them under the laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them.

Deny that credits allowed under Sec. 4 of said Act are sufficient in any case to offset entirely or in any part the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or that the allowance of credit by way of tax levied in said Act or graduation of said tax were both or either as provided for in said Act, any part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are very few merchants in Kentucky whose gross annual sales in a single or individually-owned

store exceed $400,000, or that the gross annual sales of practically all such retail merchants are far below $100,000, or that in any instance, are below $50,000.

They deny that in practical effect or operation, or otherwise, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores with two or more, or without departments, or who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act; or that they constitute a small class of limited number in Kentucky, or that there is no just or reasonable basis for the classification of retail merchants.

They deny the average retail merchant conducting a general store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant would pay the State of Kentucky, upon the kind of stock carried in his [fol. 85] general store, special State license or excise taxes aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an actual capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, that it could not or would not be assessed under said Act with a tax exceeding $25, or that it would in any instance be assessed with no tax at all, or that any excise or license tax would in any case be substituted for any tax so imposed upon it by said Act.

They deny that exactly the same annual gross sales made by the plaintiff in one of its departments in competition with said average retail merchants would be added to all other retail gross annual sales made in all other departments of plaintiff's store and subjected to a tax at a rate of 1/20 of one per cent levied by said Act upon the average retail merchant, or that the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

XVI

For answer to paragraph sixteen defendants deny that the design, intent, practical operation or effect of Sec. 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purpose of taxation the gross sales of any stores or departments, although separate or distinct enterprises; or without regard to their location or to the fact that said stores or departments are each engaged in sale at retail of wholly different merchandise or commodities unrelated to the store or [fol. 86] merchandise sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is to tax, penalize, or because of the increased rates of taxation in the higher brackets, is to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership; or to tax, penalize or in effect to prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of ultimate management.

XVII

For answer to paragraph seventeen defendants deny that for many or any years past there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording the so-called individual or single-store retail merchants engaged in Kentucky or elsewhere in the business of selling at retail, goods, wares or merchandise of the character handled or sold by this plaintiff in its retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in material respects as to prices, quality, or kind with merchandise handled or sold by this plaintiff in its retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or organizations, for a small fee, or for any fee, afford to retail mer-

chants operating individual specialized stores throughout Kentucky or elsewhere, affiliated with them, any or all the facilities or advantages in the matter of selection of goods [fol. 87] or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or in any cases such co-operative associations or organizations afford to their employees, members or partons any advantages or facilities along such lines. They deny that such co-operative associations or agencies afford to any retail merchants in Kentucky or elsewhere, affiliated with them, the benefit of their advice or experiences in co-operative action in securing increased results in advertising the goods or such retail merchandise to the buying public, as well as advice or suggestions as to the most approved or advanced methods of selecting goods of the proper style or quality, or for the displaying of such goods in the retail stores of various retail merchants affiliated with such co-operative associations or agencies.

They deny that any retail merchants, owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, or for any time, as part of the economic development of the business of a retail merchant, have availed themselves of the services or facilities thus afforded by such co-operative associations or agencies, or that such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store, or stores, or that they can buy goods of as high class or quality at similar prices as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be less than $400,000 per annum in any retail stores owned or operated by them in Kentucky.

[fol. 88] They deny that the plaintiff, by reason of its operation of a department store or the large volume of gross sales made by it therein, has no advantage over the retail merchants operating a specialized individual store in competition with the store of this plaintiff or any depart-

ment therein, or that any of the said specialized individual stores have annual gross sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiff's store competing with such specialized individual retail merchant.

They deny that the specialized individual merchant has the facilities or better advantages for displaying his merchandise, of whatever character it may be, in a small store located directly on the ground floor with display windows facing directly upon the streets upon which the retail store is located, or that any of the said specialized individual retail stores competing with the plaintiff have made substantial or any inroads or encroachments upon the trade of its plaintiff in its various departments established in Kentucky for any years prior to the opening or establishment of such specialized individual stores. They deny that there is no just, proper or reasonable basis for the classification in matters of taxation between this plaintiff and the retail merchants conducting specialized individual stores.

XVIII

For answer to paragraph eighteen defendants deny that the classification made as a basis for the tax imposed by said Act rests upon the gross retail sales or that the percentage of said tax is increased with each $100,000 of sales above $400,000.00 unequally, disproportionately or arbitrarily, or tends to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency, or the ability of [fol. 89] the retail merchant in the State of Kentucky to increase his sales above $400,000.00.

They deny that the practical operation or effect of the alleged unequal or disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that the retail merchant who increases his sales one hundred thousand dollars above $400,000 pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are $200,000.00; or that for the next $100,000.00 increase, said merchant is required to pay an additional $250.00; or for the next $100,000 increase, an additional $400.00; or a greater tax on said one hundred thousand dol-

lars of increased sales than the entire tax of a retail merchant whose total sales are $500,000.00; or for the next $100,000 of sales, $550.00, which tax on said $100,000 of sales is as great as the total tax of a retail merchant having a total sales of $600,000.00; or for the next $100,000, the tax is $700.00; or for the next $100,000 of sales the tax is $850.00, or for the next $100,000 of sales, or for every $100,000 of sales thereafter, the tax assessed is $1,000.00, or that it is a greater tax for $100,000 of sales than the total tax required of a merchant whose total sales are $700,000.00.

They deny that under the said Act that a retail merchant having gro sales in any amount not exceeding $300,000.00, who increases his sales $100,000, is only liable to a maximum increase of taxation of $50.00, less his permitted credits, or that the plaintiff is subject to a tax of $1,000.00 on every $100,000.00 increase in sales. They deny that said classification is unjust, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph nineteen defendants deny that the classification or graduation made as a basis for the tax [fol. 90] imposed rests wholly or in part upon the amount of gross retail sales of all stores, controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. They deny that said classification does not rest upon the ability of the taxpayer to pay such tax, or that it does not rest upon the income or earnings from any store or stores, or that it does not have a relation to receipts. They deny that it imposes a tax regardless as to whether said sales are made at a profit or loss, or the amount of profit or loss therefrom, or that it has no relation to profit or loss, if any is derived from said sales, or that it has no relation to capital employed or invested, or that it does not take into account the type of business. They deny that said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or the sales on credit for which payment is not received, or that it classifies sales solely as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation. They deny that said Act taxes the

dollar of sales of certain retail merchandise upon a rate and basis materially different from the dollar of sales of other merchandise by merchants engaged in direct competition or similarly circumstanced.

They deny that the rate of taxation is unreasonable, without a rational basis or that it is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph twenty defendants deny that such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any of the advantages [fol. 91] which flow from group or co-operative buying on a large scale, the pooling of merchandising power, the ability to contract for buying goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein or that said co-operative associations combine cooperatively as great a number of stores or have as great purchasing or buying power, or have as great advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that singly or individually-owned stores or members of co-operative associations are similarly situated or circumstanced, or that they are in direct competition with the plaintiff or other retail merchants owning two or more stores or are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that such competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, or that in practical operation or effect they are exempt from taxation under said Act.

They deny that such competitive stores are given undue or unfair or any economic advantages over the retail stores of the plaintiff or other merchants similarly situated or that they are in effect aided, helped or subsidized under said Act

in their competition with the plaintiff or other retail merchants similarly situated.

XXI

They deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky or elsewhere in the United States, at the present time or at [fol. 92] any time, is to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of all or any merchandise or capital; or that the retail merchant is required by reason of a small percentage of profit on single sales to have a large volume of sales or to continuously increase his sales volume in order to secure a fair turnover or return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which this plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for any merchant to meet such competition or to conform his business methods therewith, or, that in conformity therewith, the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise to the public at the lowest prices consistent with a small average profit in individual sales, or that the plaintiff or any other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair or reasonable or adequate return upon the invested capital employed in the conduct of their business, or that such merchandising methods are the basis of the business of the plaintiff or other retail merchants similarly situated, or that they are of benefit to the general public of the Commonwealth of Kentucky, or that they have brought to the plaintiff or any other retail merchants similarly situated a large or valuable good will or a large sales volume.

XXII

For answer to paragraph twenty-two defendants deny that the Act is unfair, unjust, unequal, oppressive or dis- [fol. 93] criminatory in the matter of taxation, or that it has imposed upon this plaintiff or other retail merchants simi-

larly situated, an unjust or intolerable or any burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, or that it will destroy or impair, or that the purpose of said Act is to destroy or impair, the good will or established trade or business or thereby reduce the annual gross sales made by this plaintiff or other retail merchants similarly situated, or to divert trade or custom from the retail stores of this plaintiff or other retail merchants similarly situated to the more numerous but less progressive retail merchants who have very much smaller annual gross sales. They deny that such Act in purpose or effect is in any way lacking in uniformity of application to persons or occupations taxed thereunder, or that it designedly or otherwise, transfers to or imposes upon the plaintiff or any other retail merchants similarly situated an undue proportion of license taxes attempted in said Act to be levied upon retail merchants. They deny that the Act designedly or otherwise discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid by the plaintiff or other retail merchants similarly situated who have annual gross sales in large volume, or that said Act denies to this plaintiff or other retail merchants similarly situated the equal protection of the laws guaranteed to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph twenty-three defendants deny that there is a large number of retail merchants lawfully engaged in the operation of one store, either with or with-[fol. 94] out separate departments such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff, or that each of them is subject to taxation in the higher brackets at any discriminatory or unjust rate of taxation, or that such is done to the exclusion of any number of retail merchants competing with them

respectively, who have much smaller gross annual sales or that any of such merchants are not required to pay a tax.

They deny that the retail merchants conducting stores in Kentucky, who are thus similarly situated are entirely too numerous to be joined in this suit as parties plaintiff, or that the matters and things complained of in the bill of complaint or the questions raised herein, as to the legality of the tax complained of, are all questions of common or general interest to any persons constituting a class so numerous as to make it impracticable to bring them all before the Court herein, or that this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations herein mentioned.

They deny that this plaintiff brings this suit on its own behalf and in behalf of the following:

J. Bacon & Sons,
H. P. Selman Company,
Kaufman-Straus Company,
Herman Straus & Sons Company,
John C. Lewis Company,
Hook Drug Company,
Hubbuch Bros. & Wellendroff,
Lemon & Sons,
S. H. Kress & Co.,
Great Atlantic and Pacific Tea Co.,
Montgomery, Ward & Co.

[fol. 95] XXIV

For answer to paragraph twenty-four said defendants admit all of the allegations contained in paragraph *paragraph* twenty-four of the bill of complaint.

XXV

For answer to paragraph twenty-five, defendants deny that any drastic penalties will be assessed against plaintiff for nonpayment of tax, or that any penalty will be assessed against plaintiff, or any action instituted, or that any irreparable injury or damage or any injury or damage will result to plaintiff or other retail merchants similarly situated.

XXVI

For answer to paragraph twenty-six defendants deny that section 13, setting forth the emergency clause of said Act is void, or that it has no connection with or relation to the purposes for which said Act was enacted, or that said Act did not nor could not become effective prior to June 17, 1930.

They deny that neither of the purposes for which this Act was passed, namely, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and one-half for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of the State Board of Charities and Corrections, is not related to or connected with the maintenance or development of the State Government.

XXVII

For answer to paragraph twenty-seven defendants deny that said Act is void or that it violates any provisions of the Constitution of the United States or the Fourteenth [fol. 96] Amendment thereof, or that it violates any provisions of the Constitution of the State of Kentucky as herein set forth.

(1) They deny that said Act, for reasons hereinbefore set forth, is void in any particulars or respects hereinbefore pointed out.

(a) They deny that it denies to this plaintiff or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or that it is an attempt to take their property without due process of law, as an arbitrary exaction.

(b) They deny that it denies to the plaintiff or any other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or arbitrarily prohibitive rate of taxation, or that it is based upon a classification that is unreasonable, unjust or discriminatory against this plaintiff herein or other retail merchants similarly situated; or

that it taxes this plaintiff or any other retail merchants similarly situated, at geometrically increased rates, graduated according to the increased volume of gross sales, or that such graduation is without reference to any consideration or without any reasonable basis of classification, or that it imposes upon other retail merchants, doing the same kind of business in substantially the same way, a lower rate or burden of taxation, or that it wholly exempts any retail merchants under said Act.

(c) They deny that said Act abridges the privileges or immunities guaranteed to plaintiff by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of classification or uniformity are recognized by Section 171 and 181 of the Con-
[fol. 97] stitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph twenty-eight, defendants deny that the plaintiff or other merchants similarly situated do not have an adequate remedy in the State Courts of Kentucky, or no remedy at law in the courts of the United States; or that such taxes would not be refunded if paid under protest and found to be illegally exacted.

They deny that the amount of money for the general fund on January 1, 1931, was $12,565.81, or that there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, or that such were presented for payment but not paid.

XXIX

For answer to paragraph twenty-nine of the bill of complaint, defendants admit that they will attempt to enforce the provisions of the Act referred to in accordance with its terms, but say that they have no information sufficient to form a belief as to the other allegations contained in said paragraph, and therefore neither admit nor deny same but require strict proof thereof.

XXX

For answer to paragraph thirty defendants deny that unless they are enjoined or restrained from enforcing or attempting to enforce said act the plaintiff or any other so situated, will sustain irreparable loss or injury for which it has no plain, adequate and complete remedy at law in the courts of Kentucky, or that

[fol. 98] 1. Deny that plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment, or for which they are not legally liable.

2. Deny that upon the failure of plaintiff, and others similarly situated, to pay said illegal taxes, that drastic penalties will be attempted to be enforced against plaintiff and others similarly situated, or that as a result thereof plaintiff or others similarly situated will be compelled to defend innumerable or any prosecutions brought to recover said tax and penalties or will be subject to criminal proceedings at any expense or damage to it or them.

3. Deny that defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to any irreparable injury or damage or any injury or damage to the plaintiff as a taxpayer of the Commonwealth of Kentucky.

4. Deny that if plaintiff or other similarly situated should pay the taxes under protest and commence actions to recover as provided in Section 10, of said Act, that they would be put to a large expense for attorneys' fees and court costs, or would be required to bring a multiplicity of actions in order to recover said moneys.

5. Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States.

Deny that in consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

6. Deny that said Act is ambiguous and doubtful as to its application and meaning, or as to the procedure or require-
[fol. 99] ment thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

7. Deny that the amount of said annual tax which the plaintiff will be required to pay under the terms of said Act, will be a substantial portion, or any portion of the capital invested by plaintiff to carry on its business therein.

8. Deny that the payment of such sum of money will impair the ability of the plaintiff to operate its business in Kentucky, or will decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff any fair or undue advantage over plaintiff for which the plaintiff has no plain, adequate and complete remedy at law, or that the same is true of all other retail merchants so similarly situated.

9. Deny that the enforcement of said Act will have the effect of injuring or impa-ring any lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage which right is guaranteed and protected by the State and Federal Constitutions.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted.

For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said act, rests on the volume of gross retail sales and
[fol. 100] also upon ability of those affected by the various gradations of said act to pay the tax at the rate levied, it being a well recognized law of merchandising that the percentage of income of capital invested increases progres-

sively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —% while individual merchants competing with plaintiff and those similarly situated, having gross annual sales of less than $400,000.00, earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital, based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiff, Stewart Dry Goods Company, and others similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of said [fol. 101] tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiff, and those similarly situated, and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.

(c) As volume increases, expenses decrease.

(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed [fol. 102] for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business but are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journals relating to said bill. Such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

[fol. 103] Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE STATEMENT OF EVIDENCE

In is stipulated between the parties, plaintiff and defendants, that the attached "Statement of Evidence" correctly presents, in condensed narrative form, all material evidence offered by plaintiff upon the hearing of its (or their) motion for an interlocutory injunction, and likewise correctly presents in full the evidence offered by defendants upon the hearing of said motion—the affidavits introduced on behalf of the defendants being copied into the record verbatim, at the request of the defendants.

The filing of said "Statement of Evidence" is agreed to, and further notice and formalities are waived.

Bailey P. Woottan, Atty. Gen. Ky; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Defendants. Robert S. Marx, John C. Doolan, James W. Stiles, Frank E. Wood, Solicitors for Plaintiff.

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence

AFFIDAVIT OF ROBERT J. MCKIM

He is 35 years of age, and President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewart's), a corporation organized under the laws of the State of Kentucky, with its principal office and place of business in Louisville. Has been president of Stewart's since March 10, 1930, and prior to assuming that position has been in the retail dry goods and department store business for sixteen years. Before entering this business was a student at Tulane University. By virtue of his position and experience in the dry goods and department store business, he is familiar with the methods customarily employed in conducting said business, and with the general retail situation in Louisville.

By virtue of said fact and by making comparison with the sales of his own store, of which he, as president, has personal knowledge, he is qualified to estimate the approximate gross retail sales in other stores in Louisville.

He is familiar with the location and type of all of the [fol. 106] larger retail stores in Louisville, and has had an opportunity and has observed the nature, extent and character of their business. He is likewise acquainted with many of the smaller establishments, and has made a survey of the city and consulted with various department managers, buyers and executive officers of Stewart's with a view to fortifying his information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewart's, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewart's. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as to determine whether or not a particular department is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewart's handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.

[fol. 107] 3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which he has made, as mentioned above, he has made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with his personal knowledge and the knowledge of the various department managers with whom he has consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which

Stewarts makes of its departments. Therefore, he has carefully examined the classifications made by the City Directory and in every instance reasonably possible, he has listed all of the stores competing with Stewarts. This results in a classification of about ten different kinds of [fol. 108] competition, thereby furnishing as accurate an analysis of the general retail situation as he knows how to make.

In the lists following he has in general omitted other department stores unless for particular illustration where he has noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that he knows of:

(Affiant here lists eight stores by name and address.)

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of The Stewart Dry Goods Company would be $465.70 on sales made in those departments approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in [fol. 109] Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-four specialized stores:

(Affiant here lists fifty-four stores by name and address.)

In his opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company	425 South Fourth Street
Levy Brothers	Market—Cor. Third Street
Lovenhart & Co.	Cor. Third and Market
Rodes Rapier Co.	Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boys' clothing and boys' furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon [fol. 110] the dollar of sales of each of the above fifty-four stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments of Stewarts.

C. Clothing Dealers—Women's and Misses—Retail

Under this heading the directory lists thirty-one stores to which he has added from other sources of information sixteen additional stores with the result that the following list is, in his opinion, complete:

(Affiant here lists forty-seven stores by name and address.)

Of these stores more than one-half of them are located in the downtown shopping district where the competition

for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00:

Du Rand Perry Co.	538 So. Fourth Street.
Besten-Langen Company	518 So. Fourth Street.
Byck Bros. Co.	532 So. Fourth Street.
Mangels, Inc.	528 So. Fourth Street.
H. P. Selman Co.	4th St., at Walnut.

There is no essential difference between the methods of doing business of the above stores located in the downtown [fol. 111] shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which he has added eight others, making the following complete list:

(Affiant here lists twelve stores by name and address.)

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

E. Dry Goods—Retail

The Directory Lists 152 stores other than department stores which handle dry goods.

The following department stores have, in his opinion (in all departments, including dry goods) sales in excess of $400,000.00:

[fol. 112] J. Bacon & Sons..... 334 West Market Street.
Jefferson Dry Goods Company. Fourth & Jefferson Streets.
Kaufman-Straus Company.... 427 South Fourth Street.
John C. Lewis Company..... 450 South Fourth Street.
Sears-Roebuck Company..... 820 West Broadway.
W. T. Grant & Company..... 424 South Fourth Street.
Ben Snyder Department Store 522 West Market Street.
Herman Straus & Sons..... Fourth & Market Streets.

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in his opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

(Affiant here lists one hundred and fifty-two stores by name and address.)

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition.

However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

F. Fur Dealers and Furriers

The following list includes to the best of his knowledge all of the stores in the City of Louisville other than [fol. 113] Stewarts, handling furs. Due to the small number involved he has included department stores in this list with the specialized stores:

(Affiant here lists twenty stores by name and address.)

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in his opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated feature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have [fol. 114] been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

(Affiant here lists fifty-six stores by name and address.)

Of the above, the sales of the following six stores exceed $400,000.00:

Bensinger Outfitting Co.	315 W. Market Street
Central Furniture Co.	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West. Furn. Co.	720 W. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co.	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the above fifty-

six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be [fol. 115] $950.00 less deductions. Compared with this the tax on the furniture department at Stewarts would be $1,097.96 after deductions on approximately 1/5th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here he has lumped together the stores listed under the following headings in the directory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In his opinion the following list includes all of the recognized music stores in the city:

(Affiant here lists fifty-nine stores by name and address.)

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed $150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in his opinion complete:

(Affiant here lists thirty-eight stores by name and address.)

[fol. 116] Two stores located on Fourth Street which, he is advised, are owned by the same merchant have together

probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which he has listed are in the downtown shopping district where they are in continuous active competition with the millinery department of Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

(Affiant here lists sixty-six stores by name and address.)

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. [fol. 117] Compared with this the tax after deduction of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that he knows how to make from the sources of information available to him.

Various specific instances as to other department- occur to him, demonstrating the discrimination against Stewarts, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods

and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon his estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1/5th in amount of those made by said company.

[fol. 118] Again, Stewart's china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years, conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales in every instance that he knows of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps, do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

[fol. 119] Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from outside the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewarts' sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

[fol. 120] In nearly all of the cases which he has mentioned the specialized stores competing with one or more of Stewarts departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order houses located in other States who secure by mail and catalogue, orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and makes sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Ken-

tucky, it is apparent that their competition is felt only in cities large enough to attract their exhibtions. It is only in the larger cities that there are stores of sufficient size [fol. 121] to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which he has made are equally applicable for other years than 1930, and to other lines of trade than those which he has expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. He knows of no reasonable basis upon which the classification made by the 1930 Sales Tax Law can be justified.

Robert J. McKim.

(Duly verified.)

AFFIDAVIT OF FRED LEVY

He is senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western District of Kentucky, at Louisville, being No. 610 on the equity docket.

He is 53 years of age, and all his life has been in touch with the business of Levy Bros., founded by his father and his father's brothers about 70 years ago and from the beginning conducted in one store at the same location, hav- [fol. 122] ing been connected with this firm for over 36 years. After the death of his father and his brothers, he became the senior member of the firm, and in that capacity he has had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling display of goods, advertising and the many other questions of vital importance that determine the success or failure of a retail store, and especially of a store like that of Levy Bros., handling lines of merchandise

in which the taste of the buying public must be trained as well as indulged.

He knows the recurring problems of ever-changing conditions and keen competition constantly facing retail merchants in such a business as that of Levy Bros. He knows the value of a good name and a good business reputation in developing and preserving the goodwill of a business. His firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, he knows that, year by year, they have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of [fol. 123] such size that he can handle it at small expense by himself of members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted in 1930—at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the

1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of [fol. 124] complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of compensation with Levy Bros. Richman Bros. Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut Streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent., when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such dis- [fol. 125] crimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual mer-

chants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros.

Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discrimination against Levy Bros. effected by the 1930 Gross Sales Tax Law.

[fol. 126] Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louisville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that [fol. 127] of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

(2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

(3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that the affiant has no personal knowledge as to [fol. 128] the gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

(Duly verified.)

AFFIDAVIT OF DANN BYCK

He is President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is, the owners do not own or control

any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect [fol. 129] each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in Byck's store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as [fol. 130] these competitors must bear a much heavier burden.

He has spent the last 10 years in the employ of Byck Bros. & Co. and he is familiar with the general rules governing the operation of stores carrying on this type of business. In Byck's case, they operate on the basis of a small margin of profit. This is one of the outstanding features of efficient merchandising. Byck's records show that they make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store

of this type. It can be readily seen that the Kentucky Gross Sales Tax takes a large percentage of this profit.

This store was established 30 years ago by affiant's father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Its growth is due to the adoption of efficient merchandizing methods and it would be discarding these methods if it attempted to secure a larger profit than it is making. It will have to content itself, therefore, with the 1% profit it is making. If it increases its sales the per cent of profit to sale will not increase but the tax would. For example, assume that through intense effort and application it is able in 1930 to increase its business an additional one hundred thousand dollars, on which it would earn, figuring on a 1% basis, a net profit of [fol. 131] $1,000. Under the confiscatory terms of this tax, $700 of this $1,000 profit would be taken. If, in the course of another year, it gains another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if it is able to reach its goal of $1,000,000 by adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that the sales of this department should be added either to the sales of all other departments in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by Byck's in Louisville. [fol. 132] He is not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of the Louisville store but he is certain that the sales will not

be taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and Bycks will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to the sales in Louisville then it increases Byck's sales and places it in a bracket where its tax approaches 1% and as a result this department would be subjected to a higher tax merely because Byck's operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies' shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon Byck's and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell it in their particular line and take away its business without subjecting themselves to the tax. It must be borne in mind that these persons have the same [fol. 133] buying facilities that Byck's has. About 95% of them belong to buying organizations and they purchase for their store as much or more than Byck's buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of Byck's department. If Byck should increase the sales of this particular department or any department the increased sales would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell Byck's because of the fact that Byck's had to pay a heavy tax not imposed on him. He could, therefore, take away all this business and increase his sales to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if Byck would make them and only 1/20 of 1% if its competitor would make them.

Dann C. Byck.

(Duly verified.)

AFFIDAVIT OF C. B. TURLEY

He is President of the Kaufman-Straus Company, Incorporated, hereinafter called "Kaufmans," which operates a Department Store in the City of Louisville. It sells Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Depart-
[fol. 134] ments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department of this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the maximum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, [fol. 135] and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, Kaufmans Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels Kaufmans to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing it into the higher bracket.

Another example is the Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are owned by corporations which do not own or operate any other Department in this store. He is informed and believes that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments [fol. 136] operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing it in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the leased departments would be added to Kaufman's sales, its tax would be increased by the outside sales. Under either construction, the addition of sales in unrelated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell Kaufmans and deprive it of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Depart-

ment Store operates ten Departments, each of which has [fol. 137] sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all Kaufmans business is taxable at a high rate, its competitors could take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

(Duly verified.)

AFFIDAVIT OF ARCH B. DAVIS

He is vice-president of the Citizens-Union National Bank in Louisville, Kentucky. Has held that position for approximately fifteen years.

By virtue of his position he has bought, sold and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. He [fol. 138] believes that he has handled as large a number of Warrants through the Citizens-Union National Bank as any individual in the State.

His experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing, and he estimates that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which

would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

Amount of warrants outstanding against the General Fund	$9,880,502.76
Amount in General Fund available to pay off same	12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

(Duly verified.)

[fol. 139] AFFIDAVIT OF G. H. PARKER

He is the manager and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one

department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

(Duly verified.)

[fol. 140] NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS, GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

[Title omitted]

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributors' Association, the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributors' Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

"To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

[fol. 141] 1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next $100,000 of sales.
8/20 of 1% on the next $100,000 of sales.
11/20 of 1% on the next $100,000 of sales.
14/20 of 1% on the next $100,000 of sales.
17/20 of 1% on the next $100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State Legislature has a perfect right to instigage any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

[fol. 142] In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe $2.00 in order that the Association may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% Sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers' interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoys a volume of less than $60,000 and that for that reason 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic [fol. 143] & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars' worth of sales; that there is a breakdown at $249,999 and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to made certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that [fol. 144] they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to test the law; that he mailed out a bulletin on December 27, 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

"To Grocery Manufacturers and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed 'the 1930 retail sales tax law.'

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

[fol. 145] While our state lawmakers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents—were engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. If this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional, but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart-, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

and that he sent out bulletin dated December 9, 1930, to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3 and reads as follows:

[fol. 146] December 9, 1930.

"To the Wholesale Trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know,

is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1% tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing The Kentucky Food Distributors Association to employ legal counsel, and pro rata the cost among wholesale and retail grocers.

An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must be final on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up your financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

We must get our money together not later than December 20. Please mail your check for ten dollars at once, and

get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would [fol. 147] be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4, and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all sales made by them at retail. The instructions seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quanties and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to the [fol. 148] Gross Sales Law.

[fol. 149] AFFIDAVIT OF JAMES R. KARIBO

He is manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street, in Louisville, Kentucky. Has held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the facsimilie signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has [fol. 150] repeatedly seen it upon the licenses issued to registered pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

(Duly verified.)

EXHIBIT 1 TO AFFIDAVIT OF JAMES R. KARIBO

(Kentucky Pharmaceutical Association)

January 16, 1931.

To the Druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it

will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

[fol. 151] The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If your sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20

of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect [fol. 152] right to instigate any legislation to take care of the state government expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe [fol. 153] $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the

maximum tax while the independent will be subject to the minimux tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independent interests. Your share in this is $2.00. Send it [fol. 154] now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later.

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

(Envelope)

After 5 days return to J. W. Gayle, Secretary Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.

Liggetts Drug Store, 302 S. 4th Str., Louisville, Ky.

AFFIDAVIT OF N. A. BASH

He is District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. Has held his position since September, 1927.

[fol. 155] The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain

drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it.

He is a registered pharmacist in Kentucky, and by virtue of such registration he is, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

He has read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Walgreen's, Liggett's, Dow's, and Whelan's, the latter being known locally as Taylor Drug Company Stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand and the so-[fol. 156] called "independent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have attempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members,

the circular letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

[fol. 157] AFFIDAVIT OF H. C. AMUSTUTZ

H. C. Amstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, Underwear, and Lingerie.

D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-Wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

[fol. 158] K. Women's Millinery, Men's Hats and caps.

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lawenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

Name and type of store	Estimated sales in excess of
None	$1,000,000
None	900,000
None	800,000
None	700,000
None	600,000
None	500,000
None	400,000

Approximate number below 400,000 as shown by directory.

4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

[fol. 159] Rotary Club.

Member of Local Masonic Lodge.

Manager and Wife member of Local Eastern Star.

Entire family liberal contributing members of local church.

Red Cross.

Member of Municipal Golf Club.

Member of Y. M. C. A. (just recently closed).

Retail Merchants Association

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set opposite to their names:

Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boys Scout	25.00
Christian Record Publishing Co.	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50
Cousin Molly Milk Fund	5.00
Retail Merchants Assn. (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave Natl. Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of [fol. 160] the J. C. Penney Company in a local bank of Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Company head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what departments he

can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount to [fol. 161] approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are operated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competi-

tive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily believes.

H. C. Amstutz.

(Duly verified.)

[fol. 162] STATEMENT RE SIMILAR AFFIDAVITS

Similar affidavits to that of H. C. Amstutz were filed by the following managers of the J. C. Penney Company stores in Kentucky covering the same facts in their application to their particular communities:

Cities of the Second Class:

L. M. Ross	Lexington, Ky.

Cities of the Third Class:

C. R. Leininger	Bowling Green, Ky.
E. R. Probasco	Corbin, Ky.
B. E. VanAntwerp	Frankfort, Ky.
W. G. Howell	Henderson, Ky.
E. C. Purvis	Hopkinsville, Ky.
M. S. Gesley	Maysville, Ky.
A. C. Miller	Middlesboro, Ky.
O. A. Rhodes	Owensboro, Ky.

Cities of the Fourth Class:

W. T. Morgan	Central City, Ky.
W. G. Jenkins	Georgetown, Ky.
Robert Wright	Madisonville, Ky.
H. H. Craven	Mayfield, Ky.
T. B. Jones	Mt. Sterling, Ky.
P. O. Wolverson	Paris, Ky.
C. W. Gowin	Princeton, Ky.
B. E. Willis	Richmond, Ky.
J. D. Delano	Winchester, Ky.

Cities of the Fifth Class:

J. A. Gude	Glasgow, Ky.
B. A. Aistrop	Lancaster, Ky.

The testimony of the foregoing 20 witnesses is in all essential respects identical with the testimony of H. C. Amstutz, and the effect thereof is simply cumulative—hence these affidavits are omitted for the sake of brevity.

[fol. 163] AFFIDAVIT OF DOLPH WILE

He is the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. He has been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, he is familiar with the general retail situation in the City of Lexington, Kentucky. He is familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years he has had an opportunity to observe the amount and character of their business. Basing his opinion upon these various factors and his own experiences and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Lexington, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

(Affiant here lists seven stores by name and address.)

[fol. 164] Basing his opinion as aforesaid, he estimates that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner

in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

(Duly verified.)

AFFIDAVIT OF C. H. PARSONS

He is the President and chief officer of the Parsons-Faulkner Company of Ashland, Kentucky. The Parsons-Faulkner Company operates the largest retail department store in Ashland. He has been in the department store business for eleven years and was one of the organizers of The Parsons-Faulkner Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, of Ashland, Kentucky, he is familiar with the location, management and type of the various other stores in Ashland, and over a period of a great many years he has had an opportunity to observe the amount and character of [fol. 165] their business, basing his opinion upon these various factors and his own experience and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Ashland, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion his is the only store in the City of Ashland, having annual sales in excess of $400,000.00; his sales amounting to approximately $450,000.00.

Basing his opinion as aforesaid, he estimates that there are approximately 300 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out herein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Ashland in the same manner in which he has demonstrated their application to the City of Louisville.

C. H. Parsons.

(Duly verified.)

[fol. 166] AFFIDAVIT OF MILTON MARX

He is a member of the partnership of Louis Marx and Brothers. They conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and he has had charge of the Newport store for the last forty years. Because of his experience in business in the city of Newport he is familiar with the general retail situation in that city. He is acquainted with the location and type of all the larger retail stores in Newport, and he has had an opportunity to, and has observed the nature, extent and character of their businesses.

In his opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000.00, but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In his opinion the number of such merchants does not exceed five.

Milton Marx.

(Duly verified.)

AFFIDAVIT OF ROBERT W. LYONS

He is executive vice president of the National Chain Store Association, and has had extensive experience as a lawyer, economist and financier, qualifying him as expert [fol. 167] to testify as to the facts set out in his affidavit.

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approxi-

mately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no cooperation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, [fol. 168] and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cities, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the signifigant facts of retail trade in an area embracing roughly, 10% of the retail sales of the United States. This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information, it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the

[fol. 169] single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.
2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.
3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.
4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.
5. The relations of employees to consumers must be carefully studied and developed.
6. Good management must be present.
7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established [fol. 170] realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differen-

tiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption available and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent a additional saving in price and in freight.

[fol. 171] Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatis-

[fol. 172] factory merchandise and the fact that such merchandise represents a substantial volume which is neces-

sarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with set sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66⅔% of all the net earnings of stores falling within the above averages.

Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and [fol. 173] the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various non-resident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionately accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or

perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

The best available figures indicates that the average operating expense in retail grocery enterprise is about 18% [fol. 174] of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientil-c management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-

called "voluntary chains" of independent retailers, com-
[fol. 175] prising more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store." Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailer in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that of the regular "chain store," thus saving him sub-
[fol. 176] stantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make

payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating [fol. 177] companies have often operated a new store successfully for a year or two years in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it unprofitable for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more intimate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual or so-called "independent mer- [fol. 178] chant." The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the

recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" development upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent
1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23 per cent

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no [fol. 179] "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent
1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25% per annum. The average by year mortality figures for this [fol. 180] period are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger

or more successful organization absorbs it rather than to allow it to liquidate in bankruptcy, just as it happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

A. A. Adams Stores.
National Drug Company.
Schulte United.
Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

[fol. 181] Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the State of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

(Duly verified.)

AFFIDAVIT OF JOHN B. BONHAM

He is vice president of the Kroger Grocery and Baking Company, and is familiar with practically every phase of

the grocery, meat and vegetable business as well as with the general economics of retail trade.

(This witness's testimony is principally concerned with the situation in regard to chain grocery stores, and is therefore largely omitted in this narrative.)

[fol. 182] His experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, rents, taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, Kroger has a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of more sales volume to net earnings or profits, is further illustrated by the fact that a number of stores [fol. 183] which which Kroger is in competition and which have a smaller sales volume than Kroger's stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build his business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive stores which cater

more particularly to the average consumer, who does not require special service or luxury items. He has observed that the same thing is true of other businesses with which he has had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

John B. Bonham.

(Duly verified.)

AFFIDAVIT OF W. A. STEIDEN

He is 43 years old, and has been engaged in the grocery business ever since he started to work. He was general manager of the Piggly Wiggly Valley Company beginning in 1917, and for the past two years has been branch manager for the Louisville branch of the Kroger Grocery and Baking Company.

The witness has extensive duties in checking the sales [fol. 184] and inspecting the two hundred and twenty-two stores under his management, and as a part of his duties he endeavors to keep advised as to competing stores.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

The grocery business in the city of Louisville and in the state of Kentucky is highly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations

who operate a single store. The Kroger store, situated at 2549 W. Market St., handles soft drinks, cigarettes, and oleomarganie. It pays a $6.00 license fee for the right to [fol. 185] sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th & Griffith Ave., is in direct competition with this Kroger store. I estimate its annual sales at $50,000.00 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's grocery sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars worth of sales in Kentucky, the tax on each store would be about $450.00 and when the deduction is taken off there would still remain a tax of about $425.00.

The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

The profits which Kroger endeavors to make from store [fol. 186] op-ation in the Branch over which he has supervision do not average over 1½ to 2% on gross sales, but it is not able to make this profit at all times and a number of stores in his district have been operated at a loss for the last two years. The tax, therefore, would take about one-half Kroger's profit and would frequently turn its profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppres-ive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax

has wiped out any margin of profit which it might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or else they could undersell Kroger without paying any tax on the business which they take away from Kroger. Many of the stores which Kroger operates are under long term leases, and the closing of these stores would involve heavy losses.

Many of the competitive stores, although individually owned, are now members of a co-operative association.

W. A. Steiden.

(Duly verified.)

[fol. 187] AFFIDAVIT OF D. T. PETTY

He is 31 years of age, and lives in Evansville, Indiana. For the last six years has had charge of District 14 of the Louisville Branch of the Kroger Grocery and Baking Company. His district in Kentucky is comprised of the counties of Davies, Hopkins, Henderson and Christian. The witness sets out the particular competition in the chain grocery store business within his district.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales Tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the set-offs which they are allowed to take. It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who [fol. 188] operate or own a single store, could open new stores without subjecting themselves to the tax.

He believes that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of the co-operative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who co-operate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as affiant assists the Kroger managers.

Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger stores as separate units but aggregate the sales of all of its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the benefits received by [fol. 189] voluntary association of independent store owners and permits these owners to operate without paying any tax.

D. T. Petty.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF GILBERT J. SNYDER

The testimony of this witness is concerned with the chain grocery store business exclusively, and for that reason is omitted herefrom.

STATEMENT RE AFFIDAVIT OF ALBERT B. BERGER

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted.

Affidavit of John E. Donahue

He is 30 years old and lives in Lexington, Kentucky. He has been in the grocery business for nine years, and is superintendent for the Great Atlantic & Pacific Tea Company, has charge of 49 stores in the eastern part of Kentucky.

The average gross sales of each Atlantic & Pacific store in his territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under his supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductible, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay be- [fol. 190] cause their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell oleomarg-ine, cigarettes and candled eggs. The tax on the independent store would be 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomarg-ine license would completely offset this tax. The Great Atlantic & Pacific Tea Co. has sales approximating Thirteen Million ($13,000,000) dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of the Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which mem-

bers of the Atlantic & Pacific organization have—no tax to pay.

[fol. 191] The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quantity buying and supervision by a trained expert; however, the owner of this store sells oleomargarine and cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under his supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business [fol. 192] would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell him without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which he supervises are held under long term leases and the closing of the same would involve heavy losses.

He is informed and believes that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) Per Cent on sales; that is, if they were taxed in the asme manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the co-operative association, although enjoying all the

benefits enjoyed by the Atlantic & Pacific stores under his supervision, pay no tax at all.

Groceries which are in the immediate vicinity of the Atlantic & Pacific store which he operates have no taxes to pay, while his stores have a heavy burden to meet, although these stores are direct competitors.

Each store in the Atlantic & Pacific system is a separate [fol. 193] unit, separate books are kept and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the goods it sells. The Aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax statute, disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Grocers Alliance.

John E. Donahue.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF JOHN SCANLAN

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted herefrom.

AFFIDAVIT OF CHRIS SCHULMANN

He is 40 years old, and lives in Louisville, Kentucky, and has been in the grocery business for sixteen years. He is superintendent in charge of 62 stores in the Western section of Louisville for the Great Atlantic and Pacific Tea Company.

The fact that an organization operates a store or a group of stores in another city has no effect on the stores which he supervises in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of the stores under his supervision is in direct competition with other stores which are carrying on the same kind of business as that conducted in any one of the A & P stores. The com- [fol. 194] petitors sell the same merchandise and they have

the same method of business—the only difference is that in his case he supervises a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which he supervises that are doing more than $100,000.00 worth of business a year.

Almost every grocery store in his district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. Competitors of the stores under his control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same special taxes. For example, in the city of Campbellsville, he supervises a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to [fol. 195] pay are deductible from the tax he has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores. The same result would occur in the case of every A. & P. store under his supervision, i. e., each store would be subject to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at No. 4 Kings Block; this store is under his direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and

eggs. The total special license tax which the store he supervises has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which he supervises; the business conducted is exactly the same as the business conducted in the A. & P. Store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which he supervises, and not on the competitor of that store.

In Louisville, he supervises the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd and Portland Avenue. Mr. Fischer has no other store and the [fol. 196] store operated by him is one of the chief competitors of the one which affiant supervises. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which affiant has listed above are fair examples of the situation in regard to each one of the sixty-two stores which he supervises. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which he supervises. In some cases the competing stores have a larger volume of sales than the stores under his control, but, in each case, the competing stores are owned by either a corporation or an individual that owns no other stores, and pays no tax, whereas each and every one under his supervision pays a large tax under the Gross Sales Statutes. This is caused by the fact that the sales in every one of the A. & P. stores are added together, in order to put A. & P. into a higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute would be those who operate enough stores so as to make their aggregate sales over $400,000.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect [fol. 197] of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under affiant's supervision. Such a tax would force the company to close almost all, if not all, its stores which he controls,

at least he is practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in his territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which he supervises were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which he supervises to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for competitors to undersell him, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of [fol. 198] 1%, which Hawkins could do because of the heavy tax imposed on the A. & P., he would be able to get the entire A. & P. business in Elizabethtown; he would then have sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store he operates has one or more nearby competitors who would be glad to secure the business done by his stores. The stores which he supervises attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many competitors have copied A. & P.'s attempt to supply the customer on the basis of a small margin of profit although they own only one store. Many of the competitors of the stores which he supervises are members of co-operative buying associations. These organizations purchase goods for all members of the co-operative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as he supervises the stores under his

control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, [fol. 199] under *under* the Kentucky Sales Tax Law, the members of the co-operatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in his stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF LOUIE J. JONES

He is 31 years old, and lives in Louisville, Kentucky. As superintendent for the A. & P. stores he has charge of 65 stores situated in the east end of the city of Louisville. His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative it is omitted.

Louie J. Jones.

(Duly vertified.)

[fol. 200] STATEMENT RE AFFIDAVIT OF BRACK M. FERRILL

He is 36 years of age and lives in Evansville, Indiana. He is superintendent for the Great Atlantic & Pacific Tea Company, in charge of 66 stores, of which 18 are situated in Kentucky.

His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative, it is omitted.

Brack M. Ferrill.

(Duly verified.)

AFFIDAVIT OF M. R. ANDERSON

He is Safety Director of the city of Lexington, and in his opinion the operation of a group of stores by a retail merchant does not increase the fire or police hazard except in an arithmetic ratio.

M. R. Anderson.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF HARMON NOE

He is Chief of Police of the City of Harlan, and testifies to the same effect as M. R. Anderson.

Harmon Noe.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF R. W. OWENS

He is Chief of the Hazard Fire Department, and testifies to the same effect as M. R. Anderson.

R. W. Owens.

(Duly verified.)

[fol. 201] STATEMENT RE AFFIDAVIT OF CRAWFORD LEE

He is Chief of Police of the city of Frankfort, and testifies to the same effect as M. R. Anderson.

Crawford Lee.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF JAMES W. STITES

This witness simply testified in regard to matters contained in the senate and house journals relative to the passage of House Bill No. 111. As this matter is set out in

a certified copy of the entries in the journals filed by the Defendants at the trial of this case, this affidavit is omitted.

James W. Stites.

Affidavit of Daniel M. Cohen

He is a director of the Dan Cohen Shoe Company, and has charge of the store operated by said company in Covington, Kentucky. He is familiar with the general retail situation in that city.

In his opinion there are only three stores in the city of Covington which have sales over four hundred thousand dollars in their Covington stores.

Daniel M. Cohen.

(Duly verified.)

Affidavit of Paul H. Nystrom

He is 53 years of age, and is professor of marketing in the School of Business of Columbia University. He qualifies himself as an expert upon retail marketing, [fol. 202] and particularly in regard to chain store operations.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales

per year in grocery stores and somewhat more than that in drug stores and hardwood stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses [fol. 203] of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware [fol. 204] dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with the

costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering the goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced, by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

[fol. 205] Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services, the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller, independent retailers are uniting in large numbers for the purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement

[fol. 206] by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents, instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these [fol. 207] new lines of trade earned and are entitled to their growth and success.

High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Cer-

tainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in importance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent [fol. 208] retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated:

"After an extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by the affiant and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

[fol. 209] With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store development and would cer-

tainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present development of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is the attractions of the larger cities that have caused the trade in smaller towns to decline. These chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities splendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of [fol. 210] them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignifigant businesses and, while the volume of business done is, of course not a direct measure of the importance of the retailer in his community it may be safely taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less than $5,000 or even less than $10,000 a year, there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by

a constant stream of new beginners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these con- [fol. 211] ditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious excuse for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away, he has no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element [fol. 212] in this list in which independents cannot by the application of intelligence and energy do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of the purchase of goods he can do as well as the chains. There has been a very rapid de-

velopment in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such co-operative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store systems. Indeed with buying power equalized a great many independent retailers are able, through the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers [fol. 213] have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and large, where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain stores and the net result of this competition has been and is now enormously advantageous to the consuming public.

[fol. 214] Chain store organizations are often criticized for their lack of interest in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores that they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does not have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and indepenudent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

The Kentucky Gross Sales Tax Law provides for the assessment of a graduate tax against gross sales rather than [fol. 215] net sales. Gross sales constitute an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns and allowances. They run considerably higher in clothing, furniture, floor covering, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases

still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000.00 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be [fol. 216] questioned. If the tax be added to the expenses of operating and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual [fol. 217] transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the tax. Less than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and speciality stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dis- [fol. 218] pose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also the *the* progressive development of the state of Kentucky.

Paul H. Nystrom.

(Duly verified.)

[fol. 219] LETTER OF JOSEPH MARTIN AND A. H. BRENDEL CERTIFYING GROSS SALES TAX REPORT ANALYSIS AND THE ANALYSIS

February 13, 1931.

Hon. J. W. Cammack, Attorney General Commonwealth of Kentucky, Frankfort, Kentucky; Hon. Frank E. Wood, 900 Traction Building, Cincinnati, Ohio.

GENTLEMEN: As per your request of February 9th, we are attaching hereto a report showing the number of Gross Sales Tax Reports filed with the Gross Sales Tax Department of the Commonwealth of Kentucky, and an analysis of same up to and including February 12, 1931.

These statements were compiled under the supervision of Mr. Joseph Martin, Supervisor of the Gross Sales Tax Department, and Mr. A. H. Brendel of the firm of J. D. Cloud & Co., Certified Public Accountants, and we hereby certify that the attached statements are true and correct to the best of our knowledge and belief.

Respectfully submitted.

Joseph Martin, Supervisor Gross-sales Tax Department. A. H. Brendel, Certified Public Accountant.

[fol. 220] Number of Blanks Sent Out (Estimated by Mr. Martin) 55,000

Number of Reports Filed by Retail Merchants

	Number filed	Number indicating tax	Number indicating no tax
Showing retail sales less than $400,000	16,353	11,025	5,328
Showing retail sales between $400,000 and $500,000	9	6	3
Showing retail sales between 500,000 and 600,000	4	2	2
Showing retail sales between 600,000 and 700,000	4	3	1
Showing retail sales between 700,000 and 800,000	2	1	1
Showing retail sales between 800,000 and 900,000	1	.....	1
Showing retail sales between 900,000 and $1,000,000	.....	.....	.....
Showing retail sales in excess of $1,000,000	1	.....	1
Totals	16,374	11,037	5,337
Number of reports returned showing retail merchants out of business or not engaged in retail trade (Estimated by Mr. Martin)	1,060		
Total reports received	17,434		

Number of Reports Showing Tax Liability

	No. of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing sales less than $400,000	16,353	$247,923,309	$121,741.66	$59,645.00	$62,096.66	$171,795.54
Showing sales between $400,000 and $500,000	9	4,034,504	2,422.40	1,303.71	1,118.69	6,233.71
Showing sales between 500,000 and 600,000	4	2,247,599	1,817.99	1,452.93	365.06	5,283.65
Showing sales between 600,000 and 700,000	4	2,585,035	2,518.57	1,108.12	1,410.45	177.20
Showing sales between 700,000 and 800,000	2	1,485,783	1,642.86	977.52	665.34	1.49
Showing sales between 800,000 and 900,000	1	814,559	636.15	636.15	.....	1,755.24
Showing sales between 900,000 and 1,000,000	.....	.....	.....	.....	.....	.....
Showing sales in excess of $1,000,000	1	1,325,934	6,309.35	6,309.35	.....	4,593.15
Totals	16,374	$260,416,723	$137,088.98	$71,432.78	$65,656.20	$189,839.98

Number of merchants outside of First and Second Class Cities reporting over $400,000 sales..... Two

	Number of Merchants Reporting Sales of	
	Showing tax liability	Showing no tax liability
Less than $10,000	4,897	3,666
$10,000 and under $25,000	3,668	1,108
$25,000 and under 50,000	1,521	353
$50,000 and under 75,000	455	111
$75,000 and under 100,000	187	33
$100,000 and under 150,000	152	28
$150,000 and under 200,000	61	12
$200,000 and under 250,000	34	9
$250,000 and under 300,000	22	3
$300,000 and under 400,000	28	5
Over $400,000	12	9
Total	11,037	5,337

[fol. 221] **Testimony for Defendants**

[fol. 222] NARRATIVE OF TESTIMONY OF WALTER BURR, GIVEN BEFORE ALMA RHEAD, FEBRUARY 7, 1931

WALTER BURR testified as follows:

That he has been Professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change [fol. 223] is found in the introduction of store distributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have borne to a considerable extent the responsibility of the conservation and developments of com-

munity resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where heretofore they were on an apprenticeship basis and are now [fol. 224] being introduced in high schools under support of federal funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in in-

creasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy [fol. 225] are not actually increasing but that the number of reported cases is largely due to increase in registration.

Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of co-operative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owners of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That chain store systems have extended their operation very rapidly in the last few years but that The Great Atlantic & Pa-

cific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed [fol. 226] production" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community, civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one of two stores.

[fol. 227] That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and

that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these cooperative stores is open to every individual grocery store. That members of the cooperative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain civic functions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owners as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some [fol. 228] individual merchants support the public schools and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study

and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of commitments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that a member of rural community purchases, including all necessities of life, is distributed through multiple outlet stores.

[fol. 229] That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchase would amount to $540.00 per year and assuming that efficiency results in a ten percent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five percent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redirect examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the

individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either The Great [fols. 230-232] Atlantic & Pacific Tea Company or The Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do business. That the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testified but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

[fol. 233] AFFIDAVIT OF HENRY F. WALRADT

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

HENRY F. WALRADT, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, setting in practically all of the taxation committees of the Sessions of the General Assembly. I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a mem- [fol. 234] ber of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identification, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State

[fol. 235] of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%
Express companies	2%
Telegraph	2%
Electric lights and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the [fol. 236] contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of rail-

roads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

[fol. 237]

	Tax.
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the *absolute* amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern

receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed [fol. 238] that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the *amount* of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that [fol. 239] in addition to the general property tax some other form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the

case of both taxes the rates increase as the amount of the base—i. e., gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table [fol. 240] has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than 82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky [fol. 241] Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective [fol. 242] rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of

gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due [fol. 243] under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and resulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the conclusion that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

Henry F. Walradt.

(Duly verified.)

[fol. 244] (Here follow Exhibits A and B to affidavit of Henry F. Walradt, side folios 245 and 246.)

EXHIBIT "A" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX

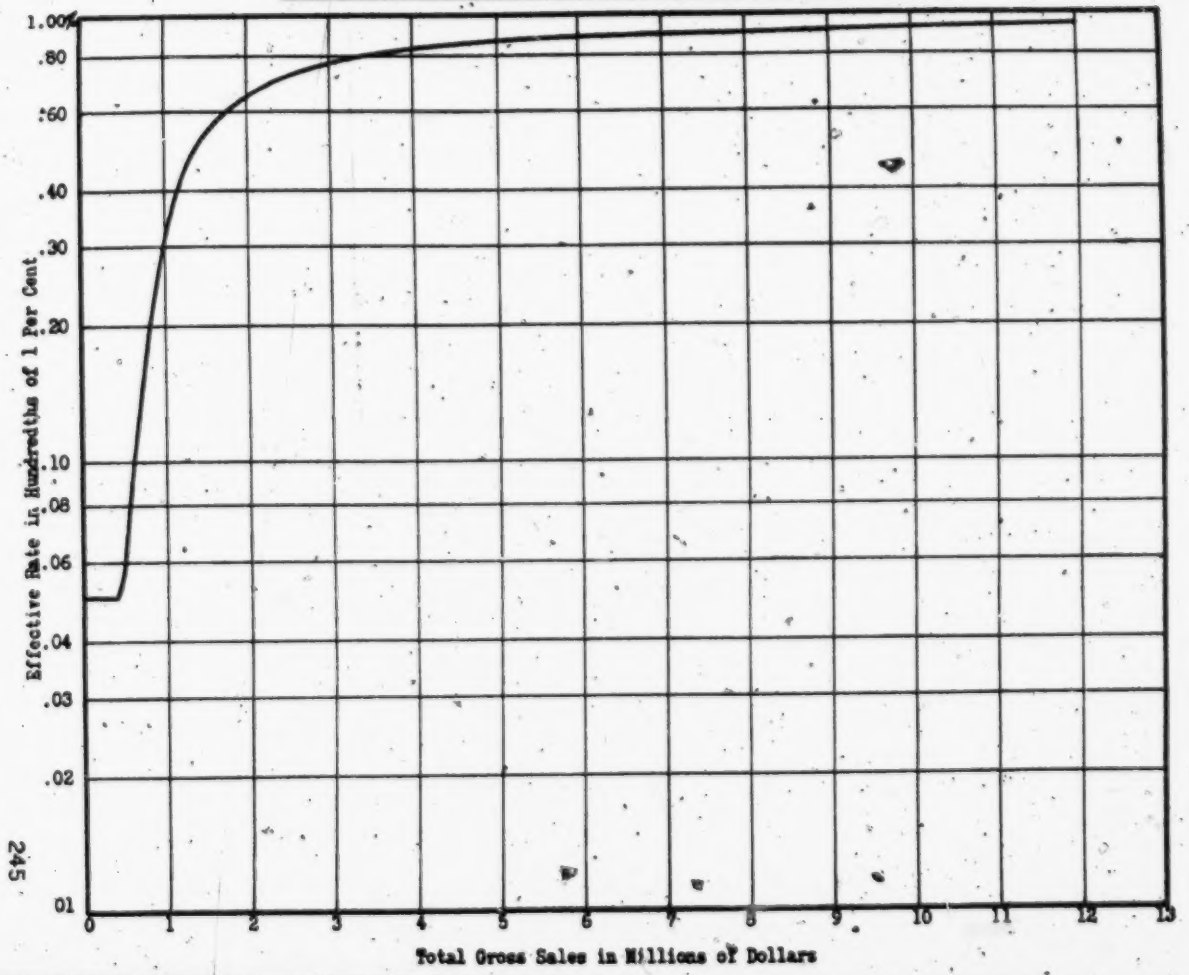
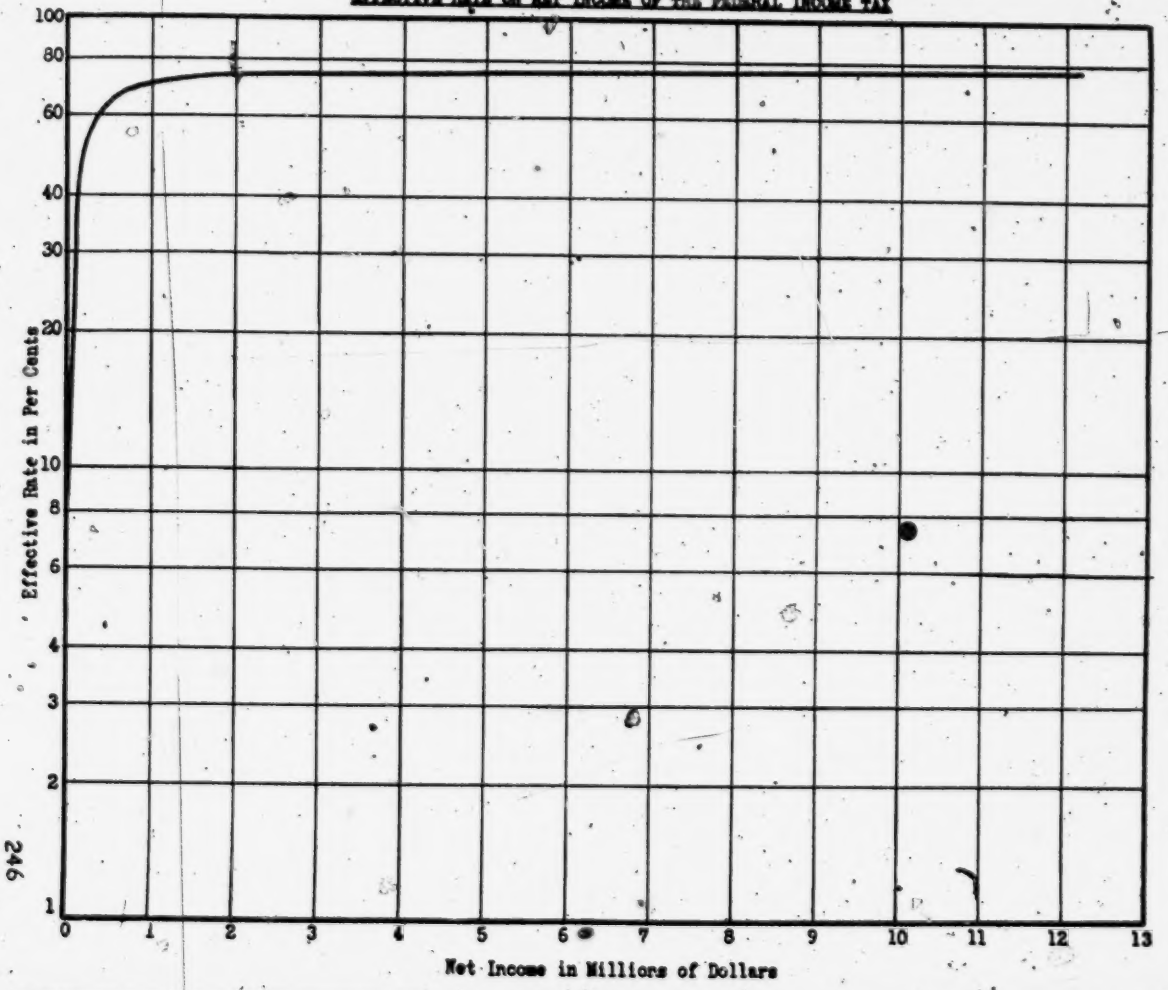


EXHIBIT "B" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



246

164B

[fol. 247]

Appendix

[fol. 248]

Exhibit C to Affidavit of Henry F. Walradt

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class. (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 249]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
2,300,000— 2,400,000	1%	2,400,000	1,000	17,050	.7104	126/10,000
2,400,000— 2,500,000	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000— 2,600,000	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000— 2,700,000	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000— 2,800,000	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000— 2,900,000	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000— 3,000,000	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000— 3,100,000	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000— 3,200,000	"	3,200,000	"	25,050	.7828	70/10,000
3,200,000— 3,300,000	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000— 3,400,000	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000— 3,500,000	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000— 3,600,000	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000— 3,700,000	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000— 3,800,000	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000— 3,900,000	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000— 4,000,000	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000— 4,100,000	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000— 4,200,000	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000— 4,300,000	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000— 4,400,000	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000— 4,500,000	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000— 4,600,000	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000— 4,700,000	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000— 4,800,000	"	4,800,000	"	41,050	.8552	31/10,000

4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000
5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000
[fol. 250]							
5,300,000—	5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000

[fol. 251]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
7,800,000— 7,900,000.....	1%	7,900,000	1,000	72,050	.9120	11/10,000
7,900,000— 8,000,000.....	Do.	8,000,000	Do.	73,050	.9131	11/10,000
8,000,000— 8,100,000.....	"	8,100,000	"	74,050	.9144	11/10,000
8,100,000— 8,200,000.....	"	8,200,000	"	75,050	.91524	10/10,000
8,200,000— 8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000— 8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000— 8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000— 8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000— 8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000— 8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000— 8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000— 9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000— 9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000— 9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000— 9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000— 9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000— 9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000— 9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000— 9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000— 9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000— 9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000— 10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000— 10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000— 10,200,000	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000— 10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000

10,300,000—	10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000—	10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000
10,500,000 -	10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000—	10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000—	10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000

[fol. 252]

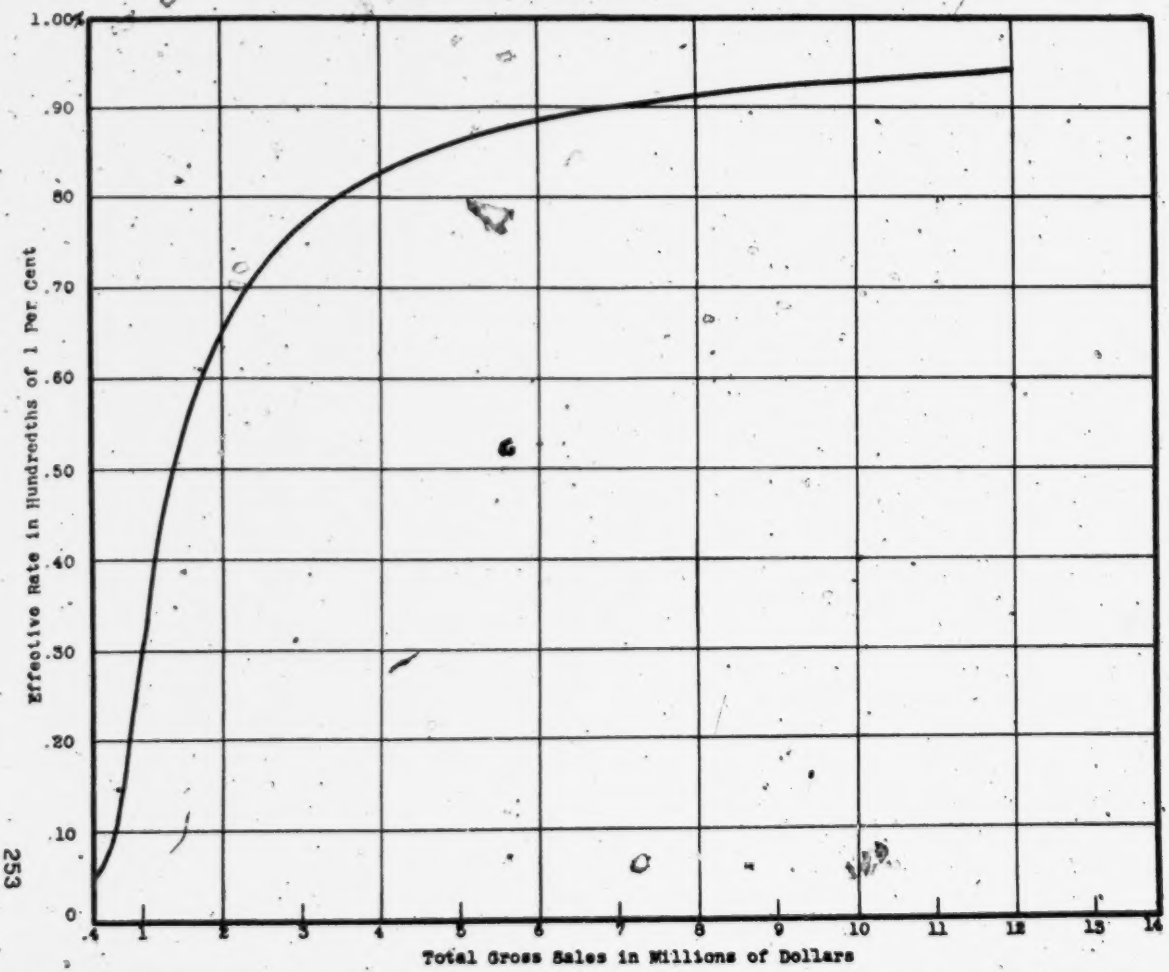
10,800,000—	10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000—	11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000—	11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000—	11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000—	11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000—	11,400,000.....	"	11,400,000	"	107,050	.93904	5/10,000
11,400,000—	11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000—	11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000—	11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000—	11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000—	11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000—	12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows Exhibit D to Affidavit of Henry F. Walradt, side folio 253.)

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



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170A

[fol. 254]

EXHIBIT E to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1913), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	120.00	113.75+	150.00	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65+	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.71+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	103.88−	109.95+	109.98+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
[fol. 255]									
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

EXHIBIT E to Affidavit of Henry F. Walradt—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105,38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

[fol. 256]

EXHIBIT F to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

1,100,000	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000	36,000	5,050	6,5[illegible]	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000	51,000	10,050	11,390	.5912	23.33+	104.53−	103.76+	111.05−	110.26+
1,800,000	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+

[fol. 257]

2,100,000	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.96−
2,300,000	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000	93,000	24.050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	05.46+
3,500,000	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

[fol. 258]

EXHIBIT G to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65−	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18−	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106,13+	138.64+	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−

[fol. 259]

2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−

2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−
2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53−
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101,05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−

[fol. 260]

7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

(Here follow Exhibits H, I, and J, side folios 261, 262, 263, 264, and 265.)

EXHIBIT "H" - TO AFFIDAVIT OF HENRY F. WALRADT

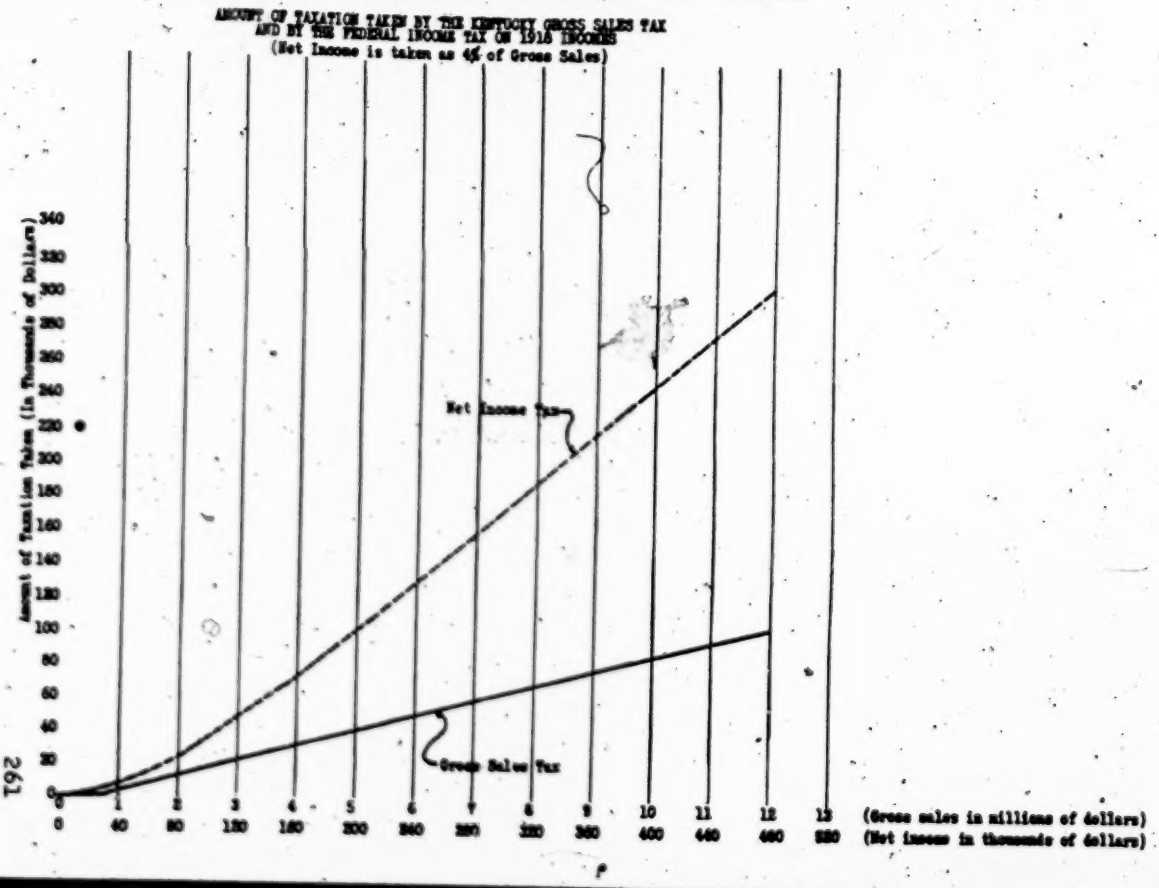
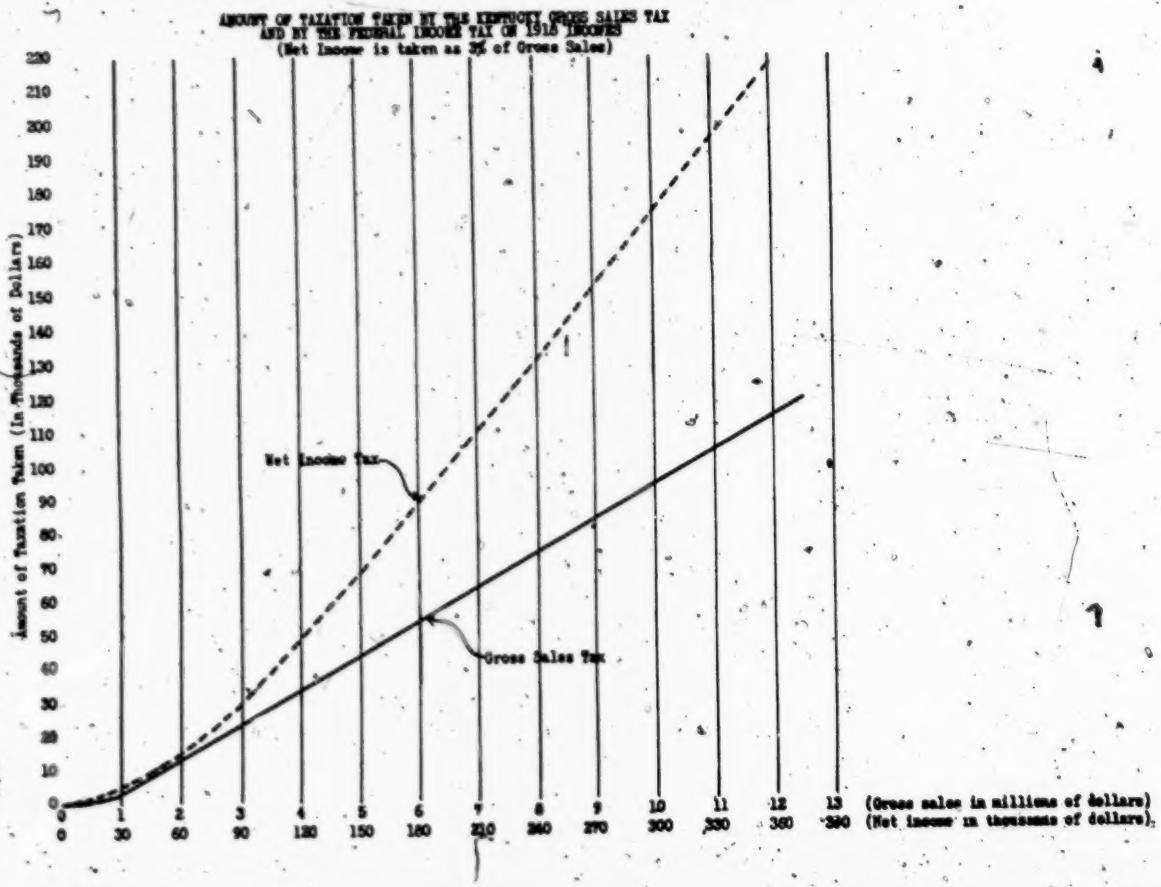


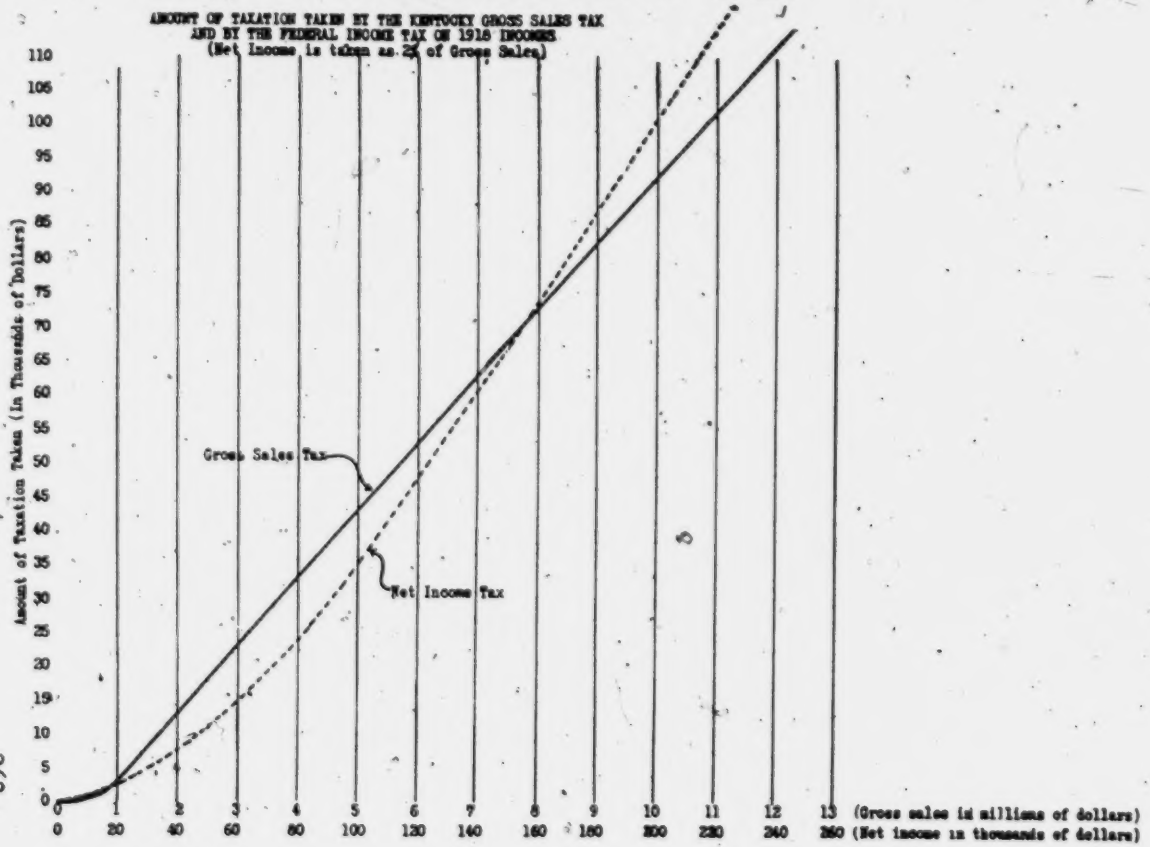
EXHIBIT "I" - TO AFFIDAVIT OF HENRY F. WALRADT



262

176B

EXHIBIT "J" - TO AFFIDAVIT OF HENRY F. WALRADT

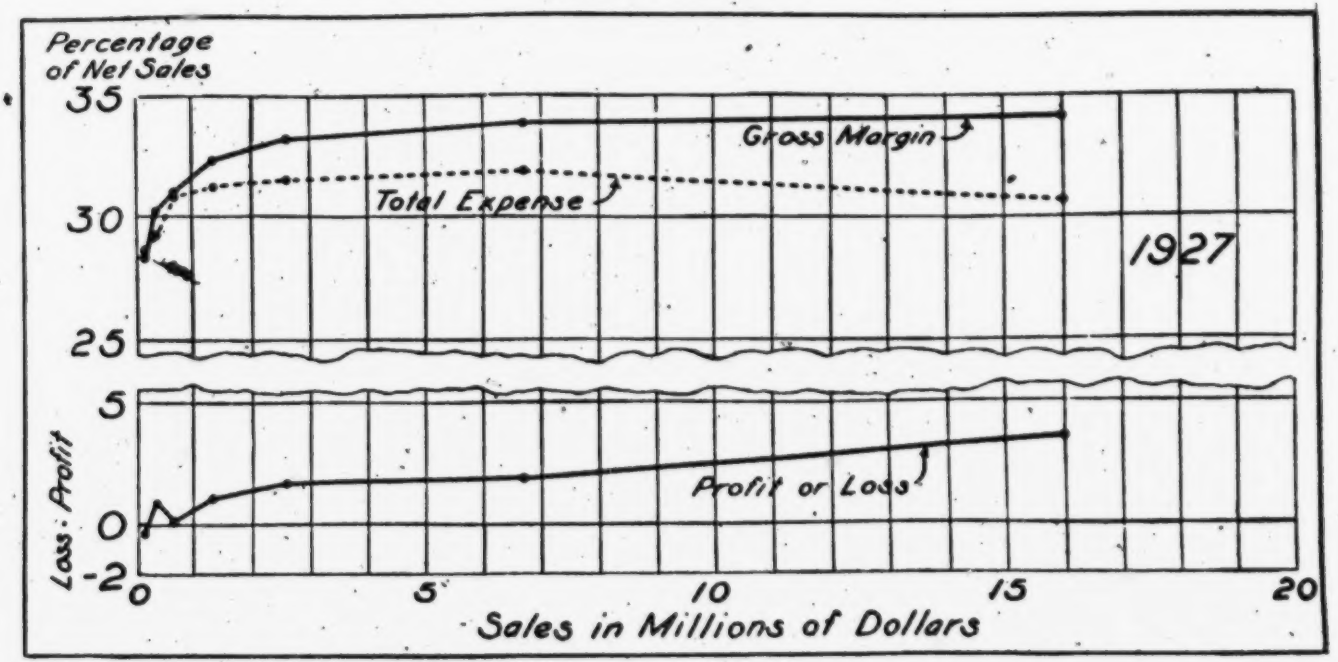


263

1760

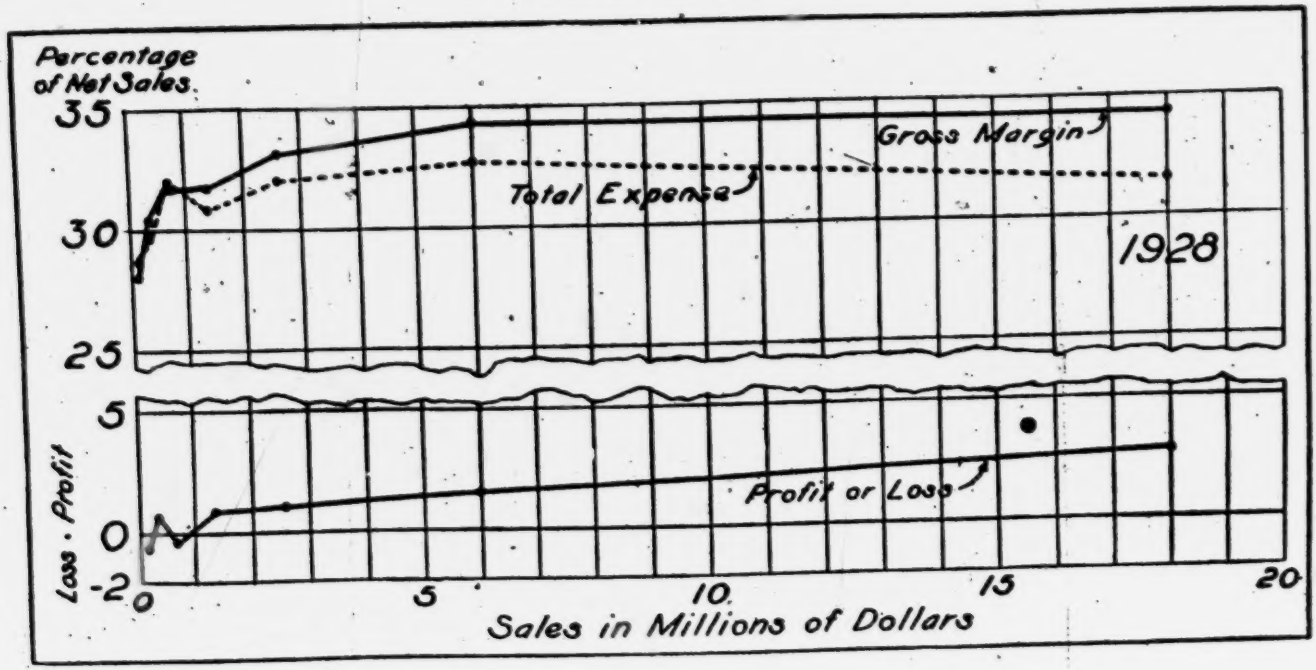
Chart 1. Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927

(Based on 508 Reports)



264
149
176D

Department Stores: 1928
(Based on 413 Reports)



[fol. 266] AFFIDAVIT OF JAMES W. MARTIN

Affidavit of James W. Martin in Opposition to Plaintiff's Motion for Interlocutory Decree

JAMES W. MARTIN, first being duly sworn, says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Professor of Economics and Director of the Bureau of Business Research in the College of Commerce and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Assocaition.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of [fol. 267] the University of Chicago, I was detailed to Washington for investigation in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit corporation engaged in investigating State, local, Federal, and foreign tax systems.

Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, the National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

[fol. 268] I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

[fol. 269] 3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this question should throw some light on the economic justification

for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statis- [fol. 270] tics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors, which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and extensive as to be unthinkable, be impugned. In other words,

the exhibits below are to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

[fol. 271] I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

[fol. 272] A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers, whether operating in chains or not, are set forth in the

exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold [fol. 273] at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928 and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

[fol. 274] The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owed capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

[fol. 275] Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail

specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there [fol. 276] is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could [fol. 277] be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore, that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will

be correspondingly large. Certain allowances for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appears as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory.

[fol. 278] Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of the page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turnover is a significant fact in retailing efficiency. That merchant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business.

Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

[fol. 279] That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turnover, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of [fol. 280] the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and [fol. 281] that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 282] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in

general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection should be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a co-[fol. 283] operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made to include as many as possible of the principal retailers whose operating results could be determined, whether

directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis [fol. 284] in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column in comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have [fol. 285] presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a decidedly lower rate on owned investment, and the smallest

group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, of these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislatiure, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same [fol. 286] source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Kentucky to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost

equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large [fol. 287] number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute [fol. 288] would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, those who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not, except in rare instances, constitute so severe a burden on merchants as to make it impossible for them to continue

in business. Indeed, the scale of rates provided will tend to bring about, but will not completely effect, an equalization of the tax burdens imposed on retail merchants of different sizes.

James W. Martin.

(Duly verified.)

[fol. 289] EXHIBIT NO. I TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as		36	2.8%	36	2.1%
Over $1,000,000	shown above		28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 290] EXHIBIT NO. II TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as		121	2.3%	140	3.0%
250,000– 499,000	shown above		69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 291] EXHIBIT NO. III TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000– 49,000	69	Loss 0.7
50,000– 99,000	40	1.1
100,000–499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University.

[fol. 292] EXHIBIT No. IV TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as indicated below			
500,000 to 2,000,000	29	11.5				
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as		36	8.9%	36	7.0%
Over $1,000,000	indicated above		28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 293] EXHIBIT No. V TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 294] EXHIBIT NO. VI TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (-000 omitted)	II Inventory, Dec. 31 cost (-000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 295] EXHIBIT No. VII TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/II
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	..	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	..	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	..	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	..	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	..	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	..	52,402,610	6,637,912	232	7.89	225,873

[fol. 296] EXHIBIT NO. VIII TO AFFIDAVIT OF JAMES W. MARTIN

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	1.58	1.00
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	4.41	2.35
S. S. Kresge Co	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co.	303,047,172	2,422,358	136,397,650	505,615	.80	.37
J. C. Penny Co	209,690,417	2,164,974	76,955,489	657,360	1.03	.85
Sears Roebuck & Co.	455,360,619	761,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co	60,628,672	675,623	224,159,596	495,410	1.11	2.05
W. T. Grant Co	65,448,298	617,436	12,987,769	86,304	.94	.66
J. J. Newberry Co	27,789,369	451,279	19,020,685	245,620	1.62	1.29
Walgreen Co	4,680,305	448,953	2,133,774	95,580	9.59	4.48
NcCrory Stores Corporation	44,706,253	437,011	37,935,356	213,447	.98	.56
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	3.85	1.18
Melville Shoe Corp	25,520,675	377,824	7,029,269	64,357	1.48	.92
S. H. Kress Co	18,427,479	370,770	9,467,722	88,771	2.01	.94
Schulte United	10,363,432	362,040	16,771,348	205,836	3.49	1.23
G. C. Murphy Co	15,726,651	297,544	4,457,129	66,358	1.89	1.49
American News Co	37,021,107	264,160	4,584,269	14,631	.71	.32
Reliable Stores Corp	14,055,480	248,714	346,911	.....	1.77	.....
Jewel Tea Co., Inc	16,844,110	207,498	7,559,542	8,604	1.23	.11
Edison Brothers Stores, Inc.	3,778,460	204,806	1,536,146	59,941	5.42	3.90

* Source: Records of Kentucky State Tax Commission.

Western Auto Supply Co	15,959,440	204,658	6,563,989	26,300	1.28	.40
Sterchi Brothers Stores, Inc	7,870,435	200,617	7,584,514	84,729	2.55	1.12
Childs Co	24,127,725	165,050	9,433,572	3,009	.68	.03
Lerner Stores Corp	19,077,143	125,160	4,973,000	7,000	.66	.14
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	.51	.42
D. A. Schulte, Inc	18,027,784	104,105	25,502,290	16,000	.58	.06
United Cigar Stores Co. of America	69,461,594	89,055	23,465,685	22,385	.13	.10
Feltman & Curme Shoe Store Co	7,671,195	72,309	2,066,232	10,183	.94	.49
Schiff Co	5,364,922	71,474	1,436,827	12,706	1.33	.88
B. & G. Sandwich Shops, Inc	3,404,523	65,476	1,360,932	10,231	1.92	.75
C. F. Adams Co	3,180,260	51,626	471,062	5,882	1.62	1.25
National Bellas Hess Co	42,448,047	45,573	8,853,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc	481,260	41,678	53,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc	1,148,864	23,935	726,350	9,093	2.08	1.25
Nunn Bush Shoe Co., Inc	2,785,483	21,792	1,124,325	6,050	.78	.54
Metropolitan Chain Stores	18,095,858	13,200	14,506,000	27,600	.07	.19

[fol. 297]

EXHIBIT No. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

[fol. 298] EXHIBIT NO. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 299] EXHIBIT NO. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34-35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folios 300 and 301.)

[fol. 300]

EXHIBIT No. XII to Affidavit of James W. Martin

Statistics of Large Retail Stores Showing the Effect of Sales Tax

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
	Net sales	Net profit after taxes	Net profit after 1% sales deducted	Net worth	Ratio, II/IV	Ratio, III/IV	Net sales	Profit before gross-sales tax	Profit after gross-sales tax	Net worth	Ratio, VIII/X	Ratio, IX/X
Atlantic and Pacific Tea Co	1053693	26220	15683	118771	22.08%	13.20%	52685	1311	791	5939	22.08%	13.32%
√Sears Roebuck & Co	403072	30058	26013	103441	29.05	25.15	20174	1503	1308	5172	29.05	25.29
√Woolworth, F. W. & Co	303047	35664	32634	158804	22.45	20.55	15152	1783	1639	7940	22.45	20.64
√Kroger Grocery & B. Co	286611	5919	3053	50549	11.74	6.04	14331	296	160	2527	11.74	6.33
√Montgomery Ward	267353	13435	10762	174457	7.70	6.17	13366	672	545	8723	7.70	6.25
√Safeway Stores	213496	6147	4012	37844	16.24	10.60	10675	307	208	1892	16.24	10.99
Penny, J. C. Co	209690	12413	10316	66612	18.63	15.49	10485	621	523	3331	18.63	15.70
√Kresge, S. S. Co. (5 & 10)	156457	14952	13388	83436	17.92	16.05	7823	748	676	4172	17.92	16.21
√American Stores	143346	6595	5161	43144	15.28	11.96	7167	330	265*	2157	15.28	12.29
Gimbel Brothers	124636	804	442*	48316	1.66	.91*	6232	40	95	2416	1.66	3.93*
Federated Department Stores	117003	4856	3686	27227	17.84	13.54	5850	243	191	1361	17.84	14.03
May Department Stores	112724	6175	5048	56161	11.00	8.99	5636	309	259	2808	11.00	9.22
√Hahn Department Stores	112323	4090	2967	43690	9.36	6.79	5616	205	155	2185	9.36	7.09
Drug, Inc	105000	17014	15964	59836	28.43	26.67	5250	851	805	2992	28.43	26.91
√National Tea Co	90201	2731	1829	17633	15.48	10.38	4511	137	98	882	15.48	11.60
McMarr	87238	2174	1301	11860	18.32	10.96	4362	109	72	593	18.32	12.41
√United Cigar Co	84679	2847	2000	72656	3.92	2.75	4234	142	107	3633	3.92	2.95
√First National Stores	75885	2905	2146	10974	26.46	19.55	3794	145	114	549	26.46	20.82
√Kress (S. H.) Co	68474	5521	4836	34785	15.87	13.90	3423	276	249	1739	15.87	14.32
√Grant (W. T.) Co	65902	3058	3299	20497	14.91	11.69	3295	153	127	1025	14.91	12.38
American News	56863	1625	1057	16049	10.13	6.59	2843	81	60	802	10.13	7.48
√City Stores	51695	2051	1534	30219	6.79	5.08	2585	103	84	1511	6.79	5.56
Mercantile Stores	48522	1069	538	16308	6.55	3.57	2426	53	36	815	6.55	4.43
National Bellas Hess	48312	214*	697*	14877	1.44*	4.69*	2416	11*	28*	744	1.44*	3.76*
Walgreen	46623	3130	2664	16034	19.52	16.61	2331	157	140	802	19.52	17.48
McCrory 5c to $1 Stores	44704	2223	1754	23137	9.51	7.58	2235	110	94	1157	9.51	8.18
Schulte Retail Stores	37420	4360	3986	29593	14.70	13.46	1871	218	206	1480	14.70	13.94
Mercantile Securities	42030	243	177*	23435	1.04	.76*	2102	12	2*	1172	1.04	.17*
√Grand Union	36943	1021	6519	6488	15.74	10.05	1847	51	40	324	15.74	12.35
Daniel Reeves	33767	1128	791	4149	27.19	19.06	1688	56	46	207	27.19	22.22
√Fashion Park	32817	948	620	14302	6.63	4.34	1641	47	38	715	6.63	5.31
F. & W. Grand	30417	1813	1509	12320	14.71	12.24	1521	91	82	616	14.71	13.37
Childs	29952	1277	978	14625	8.73	6.69	1498	64	56	731	8.73	7.66
Bohack	28866	900	612	8914	10.09	6.85	1443	45	38	446	10.09	8.52
√United States Stores	28754	475	187	5756	8.25	3.25	1438	24	17	288	8.25	5.90
Spalding, A. G., Co	27866	2050	1772	20960	9.78	8.44	1393	103	96	1048	9.78	9.12
Newberry, J. J., Co	27789	1594	1316	15056	10.59	8.74	1389	80	73	753	10.59	9.69
√Shattuck	25656	3356	3091	25309	13.26	12.21	1283	168	162	1265	13.26	12.81
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1188	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

√Shattuck	25650	3350	3091	20669	16.20	12.21	1280	165	162	1266	16.20	14.91
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1189	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†
Hale Bros	18449	310	126	5538	5.59	2.27	922	16	13	277	5.59	4.69
Oppenheim Collins	19854	1561	1363	9793	15.93	13.91	993	78	75	490	15.93	15.31
Kresge Department Store	17070	1391	1221	12064	11.53	10.12	854	69	67	603	11.53	11.11
√Jewel Tea Co	16844	1691	1524	6321	27.14	24.45	842	85	83	312	27.14	26.57
√Waldorf System	16362	1206	1042	6305	19.13	16.52	818	60	59	315	19.13	18.73
Diamond Shoe	16247	1187	1024	5604	21.18	18.27	812	59	58	280	21.18	20.71
Southern Grocery	16092	57*	218*	1471	3.87*	14.81*	805	3*	4*	74	3.87*	5.97*
Western Auto Supply Co	15960	533	373	5358	9.94	6.96	798	27	25	268	9.94	9.32
D. Pender Grocery	15921	288	129	2314	12.44	5.57	796	14	13	116	12.44	11.20
Thompson, John R., Co	15743	1585	1427	10348	15.30	13.79	787	79	78	617	15.30	15.04
Murphy	15726	897	740	6717	13.35	11.01	786	45	43	336	13.35	12.93
√Lane Bryant	17147	633	583	4415	14.33	13.20	780	31	30	221	14.33	13.57
√Peoples Drug	15543	894	738	5222	17.11	14.13	777	45	43	276	17.11	15.57
√Atlas Stores	15176	1154	1002	5614	20.55	17.84	759	58	56	281	20.55	20.10
√Neisner	15092	1025	874	5552	18.46	15.74	755	51	50	278	18.46	18.02
Best & Co	14614	1279	1133	6756	18.93	16.77	731	64	63	338	18.93	18.63
Reliable Stores	14218	1212	1069	7803	15.51	13.69	711	61	60	390	15.51	15.27
[fol. 301]												
National Grocery Co	13791	19	118*	2916	.65	4.04*	689	1	0.5	146	.65	.32
Miller, I. & Sons	13522	830	694	6553	12.66	10.59	678	41	41	328	12.66	12.50
Metropolitan Chain	13513	798	663	7534	10.59	8.78	676	40	39	377	10.59	10.37
Schulte United	12979	23	107*	10935	.21	.98*	649	1	0.3	533	.21	.06
Loblaw Groceteria	12834	1094	966	4775	22.91	20.23	642	55	53	239	22.91	22.18
√Bauman, Ludwig & Co	11238	623	502	8061	7.73	6.21	562	31	30	403	7.73	7.62
Magnim, I. & Co	10984	706	596	5022	14.05	11.86	549	35	35	251	14.05	13.94
American Department Stores	10823	225	116	3478	6.46	3.33	541	11	11	174	6.47	6.32†
Mangel Stores	10600	229	123	2760	8.26	4.42	530	11	11	138	8.26†	8.02†
Economy Grocery	10561	272	166	1135	23.96	14.59	528	14	13	57	23.96	22.80
Daley's Incorporated	10037	121	28	1302	9.29	2.15	502	6	6	65	9.29	9.23
Happiness Candy	9757	239*	336*	4522	5.28*	7.43*	488	12*	12*	226	5.28*†	5.42*†
Park & Tilford	9348	1001	908	3298	30.36	27.50	467	50	50	165	30.36†	30.20†
Schiff & Co	9919	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	3.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	24.40	21.40
	4469	211	166	1209	17.45	13.73	223	11	11	60	11.45	13.98

Schiff & Co	9919	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W.	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	3.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	24.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	11.45 7	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frocks	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02
Edison Brothers	3778	230	192	1441	15.96	13.32	189	12	11	72	15.96	15.96
Nedicks	3567	352	316	2022	17.41	15.63	178	18	17	101	17.41	17.41
Thompson Spa	3552	432	396	4007	10.77	9.85	178	22	21	200	10.77	10.72
B. & G. Sandwich	3405	133	99	897	14.83	11.04	170	7	7	45	14.83	14.83
Consolidated Automatic Merchandise	3116	555*	585*	5339	10.40*	10.96*	156	28*	28*	267	10.40*	10.40*
C. F. Adams	3163	81*	112*	1806	4.49*	6.20*	158	4*	4*	90	4.49*	4.49*
General Vending Corporation	2707	395*	422*	2062	19.16*	20.47*	135	20*	20*	103	19.16*	19.16*
Van de Kamp	2643	158	132	1148	13.76	11.50	132	8	8	57	13.76	13.76
Georgian	2607	120	94	1461	8.21	6.43	130	6	6	73	8.21	8.21
Fair Stores	2547	139	113	1051	13.13	10.75	127	7	7	53	13.13	13.06†
Crown Drug	2358	207	183	1100	18.79	16.63	118	10	10	55	18.79	18.68†
Ground Gripper	2017	129	109	1633	7.90	6.67	101	6	6	82	7.90	7.90
Nunally Co	1775	41	23	1649	2.49	1.39	89	2	2	82	2.49	2.49
Morrison Electric Co	1745	142	125	606	23.43	20.63	87	7	7	30	23.43	20.63†
Kaybee Stores	1582	216	200	890	24.27	22.47	79	11	11	45	24.27	24.27
Kane Stores	1530	159	144	1808	8.79	7.91	76	8	8	90	8.79	8.75†
Marylee Candies	1372	33*	46*	341	9.68*	13.49*	69	2*	2*	17	9.68*	9.68*
Chaffee	1220	39*	52*	486	8.02	10.70*	61	2*	2*	24	8.02*	8.02*
Allison Drug	1140	142	3	688	2.16	.50	57	1	1	34	2.16	2.08†

* Deficit.

† Ratio computed from actual figure instead of round numbers.

√ Taken from reports of corporations to stockholders where possible (marked √); otherwise from Moody's *Investment Manual: Industrials*, 1930. Data are for the year 1929 or for the fiscal year falling most largely in 1929.

Summary Showing Data in Aggregate

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio II/I	VI Ratio III/I	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Ky. gross sales tax at rates provided in statute	X Ratio VII/VI	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio VIII/VI
1,053,693–33,767	30	1,420,982	220,214	174,937	15.50%	12.31%	71,049	11,011	8,873	15.50%	12.31%	12.49%
32,817–15,543	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176– 5,030	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019– 1,140	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 302] EXHIBIT NO. XIII TO AFFIDAVIT OF JAMES W. MARTIN

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	896,719,959	14,134,788	121,247,407	1,211,462	2.8	395,774	261,376	32.67	21.58
Kroger Grocery & Baking Co	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	8,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,489	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoes	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co	18,427,479	370,770	9,467,729	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

EXHIBIT No. XIII TO AFFIDAVIT OF JAMES W. MARTIN—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Western Auto Supply	15,959,440	204,658	6,563,989	26,300	2.32	4,748	4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51
Childs Co	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	65,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Shoes	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

[fol. 303] APPENDIX TO EXHIBIT No. XLII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co	443,453,000	36,479,000	8.2*
Montgomery Ward & Co	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co	.....	.....	6.8c
Walgreen Co	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196	38,678b	.50b
Schiff & Co	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. *v.* Ky. Tax Commission *et al.*

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co	27,789,369	451,279	15,055,500	243,899	6.8	30,687	30,436	12.58	12.48
Walgreen Co	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte-United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co	37,021,107	264,160	16,048,861	113,917	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

Western Auto Supply Co.....	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc...	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.....	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.....	19,077,143	125,160	6,191,136*	40,861	6.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.....	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.75d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.....	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.....	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc..	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.....	3,180,260	51,626	1,805,826	29,254	2.34d	1,208d	1,234d	4.13d	4.22d
National Bellas Hess Co.....	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc.	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc....	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.....	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's *Investment Manual: Industrials*, 1930.

[fol. 305] EXHIBIT No. XV TO AFFIDAVIT OF JAMES W. MARTIN

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920—1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.5	3.0	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade, *Harvard Business Review*, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	20.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.3	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, *op. cit.*, p. 249.
b. Including Woolworth, Kresge, Kress. and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 306]

EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,000	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. Childs Co	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 307] EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN (Continued)

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 308]

Affidavit of Clyde William Phelps.

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

Clyde William Phelps, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

[fol. 309] I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?
2nd. Is the tax confiscatory?
3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real justification of a tax as a revenue measure rests funda-

mentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field [fol. 310] of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 311] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability [fol. 312] to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduate tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penney Company and others make it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages pos- [fol. 313] sessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four percent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting

chain prices as were certain entirely independent merchants."

[fol. 314] The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, [fol. 315] which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable.

Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers doing [fols. 316 & 317] a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

(Duly verified.)

[fol. 318] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is thirty-seven years of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections [fol. 319] of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that [fol. 320] immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky, that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions [fol. 321] for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year 1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to pro-

tection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and [fol. 322] that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been con-

victed on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; [fol. 323] no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the insane in Kentucky; the Central State Hospital at Lakeland, Kentucky erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930 was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31,

[fol. 324] 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states [fol. 325] it is the plan of the State Board of Charities and Corrections to establish an institution or colony for the epileptics of the State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross

Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted [fol. 326] of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfactory. He states that the cell block in the Women's Departmen is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited ca-

pacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly.

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect [fols. 327 & 328] of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

Affiant further states that architects have been employed by the State Board of Charities and Corrections who have

drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

Further affiant saith not.

B. T. Brewer.

(Duly verified.)

[fol. 329] ENTRIES IN SENATE JOURNAL

House Bill 111—In the House

January 21, 1930.

By Mr. J. D. Via.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

To Committee on Kentucky Statutes.

February 14, 1930.

By Mr. J. D. Via of the Committee on Kentucky Statutes.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

With a Committee Amendment thereto by way of Substitute therefor.

February 18, 1930.

Mr. Via moved that the Rules be suspended and that a bill entitled

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

Be made a Special Order for Wednesday, February 19, at eleven o'clock A. M.

Said motion was agreed to.

February 19, 1930.

The hour of eleven o'clock having arrived, that being the hour heretofore set for the Special Order of the Day, the House took up for consideration from the Orders of the Day said Special Order, to-wit, a bill entitled:

H. B. 111. An Act relating to revenue and taxation, imposing an excise or license tax on merchants, as the word "Merchant" is defined in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing [fol. 330] fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

With a Committee Amendment thereto by way of substitute therefor.

(See certified copy of bill attached hereto.)

The yeas and nays being required thereon by Messrs. Ardery and Peters, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
U. C. Anderson,
Wm. B. Ardery,
W. O. Baxter,
S. A. Blackburn,
D. C. Bradley,
T. L. Britton,
John Young Brown,
Wm. A. Eimer,
J. O. Evans,
Virgil Eversole,
F. A. Gnau,
H. G. Handmaker,
J. F. Harrison,
Robt. L. Horn,
C. E. Houck,
Grover C. Johnson,
J. Roy Johnson,
A. R. Kincheloe,
H. R. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
Dr. R. A. Byers,
J. J. Davis,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
J. W. Edwards,
Graland Embry,
Joseph B. Everhart,
John B. Furlong,
L. B. Hamilton,
Geo. H. McIntosh,
T. R. McRoberts,
Henry Meiman,
Clarence Miller,
Russell O. Miller,
F. Tyler Munford,
L. B. Murphy,
Andrew W. Nichols,
Fred A. Nolte,
Cabel A. Page,
James I Peters,

W. K. Randall,
H. L. Taylor,
C. B. Truesdell,
J. E. Walters,
G. W. Wiggonton,
J. Watt Brown,
John H. Pickett,
Dorsey Ratcliff,
Thomas H. Troxel,
H. Speed Tye,
Dr. Vallandingham,
Robert Williams.

Those who voted in the negative were:

E. S. Allison,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Lenoard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
Kelly J. Francis,
H. L. Jackson,
M. F. Jordan,
John B. Klefot,
Frank LeBus,
Martin Light,
James A. May,
Harry J. Meyers,

[fol. 331]

M. F. Moore,
B. T. Morris,
Curtis F. Park,
J. D. Patton,
John W. Preston,
D. O. Stanley,
Frank L. Strange,
E. J. Thomas,
J. D. Via,
L. M. Weathers,
Elmer J. Terry.

The substitute as offered by the Committee was then adopted as amended.

Ordered that said bill be engrossed and read the third time.

The Constitutional provisions as to the third reading of said bill at length being dispensed with and the same being engrossed, said bill was read the third time by its title only and passed.

The yeas and nays being taken thereon in accordance with the provisions of the Constitution, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
L. A. Allison,
J. J. Davis,
Winn Davis,

U. S. Anderson,
S. A. Blackburn,
L. C. Bradley,
T. L. Britton,
John Young Brown,
J. Watt Brown,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Leonard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
Henry Mieman,
J. W. Edwards,
Clarence Miller,
M. F. Moore,
F. Tyler Munford,
M. L. Napier,
Curtis F. Park,
John H. Pickett,
Dorsey Ratliff,
Frank L. Strange,
Elmer J. Terry,

[fol. 332]

Thos. H. Troxel,
H. Speed Tye,
J. E. Walters,
G. W. Wigginton,
William A. Eimer,
Graland Embry,
J. O. Evans,
Joseph B. Everhart,
Virgil Eversole,
Kelly J. Francis,
John B. Furlong,
F. A. Gnau,
L. B. Hamilton,
H. G. Handmaker,
Rev. B. L. Hargrove,
Robert L. Horn,
C. E. Houck,
R. L. Jackson,
Grover C. Johnson,
Theron M. Johnson,
J. R. Johnson,
M. F. Jordan,
A. R. Kincheloe,
John B. Klefot,
Frank LeBus,
Martin Light,
H. F. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
James A. May,
George R. McIntosh,
Harry J. Meyers,
T. H. McRoberts,
Russell O. Miller,
B. T. Morris,
L. B. Murphy,
Fred A. Nolte,
J. D. Patton,
John W. Preston,
D. O. Stanley,
H. L. Taylor,
E. J. Thomas,
C. B. Truesdall,
J. D. Via,
L. M. Weathers,
Robert Williams.

Those who voted in the negative were:

W. O. Baxter, Cabel A. Page,
J. Roy Johnson, Dr. Vallandingham.

Mr. Via offered the following amendment to the title of said bill, viz:

"Amend the title to said bill by striking from the original bill the title thereof and substituting the title of the substitute for the title of the bill which is in words and figures as follows: * * *"

(For this title see title to Substitute in Journal of today ante.)

Said Amendment was agreed to.

Resolved that the title thereof be as amended.

Mr. Via moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

[fol. 333] Said last named motion was agreed to.

Mr. Dorman moved that the session of today be extended indefinitely.

Said motion was agreed to.

Mr. Dorman moved that when the hour of twelve o'clock Merid-an arrived today that the House do then recess for one hour.

Said motion was agreed to.

[fol. 334] I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the three (3) typewritten pages hereto attached, were by me carefully compared with the official senate journal (Senate Journal 1930 Session of the General Assembly, in the hands of the public printer) and found to be a true and correct copy of entries in said journal relating to the introduction, passage and approval and enrollment of House Bill 111 of said 1930 Session.

Ella Lewis, Secretary of State. (Seal Office of Secretary of State, Commonwealth of Kentucky.)

[fol. 335] Journal of the Senate

February 20, 1930.

The hour of 1.30 P. M. having arrived, the Senate reconvened.

A message was received from the house that they had passed the following bills:

"H. B. 111. "An Act relating to revenue and taxation, imposing an Excise or License Tax on retail merchants as the words 'retail merchants' are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

To Committee on Revenue and Taxation.

February 28, 1930.

Committee Reports

Senator Booles, of the Committee on Revenue and Taxation, to which had been referred bills of the following title:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Reported with expression of opinion that same ought to pass.

March 3, 1930.

Calendar

Senator Chandler moved that the second reading at length of said bills be dispensed with, and said bills be read by their titles only.

Said motion was agreed to.

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; de-

claring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

[fol. 336] March 4, 1930.

The Senate took up for consideration from the Orders of the Day a bill entitled:

H. B. 111. "AN ACT relating to revenue and taxation, imposing and excise or license tax on retail merchants as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Senator Dacher offered the following Amendment:

"Amend House Bill 111 by inserting the word 'Cash' between the words 'gross' and 'sales' in lines number 4, 5, 7, 9, 12, 15, 17, 20 and 22 on page 2 and in lines number 10 and 26 on page 3 of the printed bill, and by adding to said bill as Section 14 thereof the following:

"Section 14. Gross cash sales are hereby defined to be sales made where cash, checks or anything of value are exchanged for goods, wares, or merchandise on the day of sale; also goods, wares, or merchandise sold on cash on delivery."

The question being taken thereof, it was decided in the negative, and said Amendment was lost.

Senator Gates Young offered the following Amendment:

Amend House Bill No. 111, section two in line six by striking out the words "or less" and inserting in lieu thereof 'in excess of the first $50,000.00.' "

"Further amend by inserting the words 'except those doing an annual gross of $50,000.00 or less' after the word 'Merchant' and before the word 'as' in line one of section three."

The question being taken thereon, it was decided in the affirmative, and

Said amendment was lost.

Said bill reads as follows:

* * * * * * *

(See certified copy filed herewith.)

Ordered that said bill be read the third time.

Mr. Allie Young moved that the third reading of said bill be by its title only. Said motion was agreed to by a majority of the members elected. The constitutional provision as to [fol. 337] the third reading of said bill at length being dispensed with.

Said bill was read the third time by its title and passed.

The yeas any nays being taken on the passage of said bill in accordance with the provision of the Constitution were as follows, viz:

Resolved that the title thereof be as aforesaid.

Mr. Allie Young moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

Said motion was agreed to.

Roll Call

Senate, March 4, 1930, Session 1930

	Yea	Nay
Adams, Samuel W.	1	..
Bartlett, Clarence	2	..
Bond, N. U.	3	..
Bondurant, Jas. H.	4	..
Booles, W. W.	..	1
Brock, H. M.	5	..
Brooks, O. H.	..	1
Chandler, A. B.	6	..
Cline, H. M.	7	..
Dacher, Frank	8	..
Davis, W. H.	..	2
Dawson, Edwin C.	9	..
Fitspatrick, H. D.	10	..
Franklin, Chas. G.	..	3
Gaines, P. B.	11	..
Gartin, O. C.	12	..
Glenn, R. E.	13	..
Holloway, Jno. S. W.	14	..
Jacobs, Silas	15	..
Johnson, Alex. E.	..	4
Littrell, L. C.	16	..
Luker, C. R.	17	..
McBrayer, J. J.	18	..
McCaw, C. W.	..	1

Moore, E. C.	19	
Pogue, Marion F.	20	
Poole, J. V.		5
Regenstein, Ellsworth	21	
Rose, Dr. J. M.		6
Ryans, Dr. L.		7
Stewart, Joe	22	
Turner, T. O.	23	
Vincent, B. M.		8
White, Frank M.	24	
Williams, Sewell B.	25	
Yates, W. A	26	
Young, Allie W.	27	
Young, Gates F.		9
Yea		27
Nay		11

[fol. 338] AN act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalfies for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. The words "retail merchant," as used in this act, shall mean and include every person, firm, association, copartnership, or corporation opening, establishing, operating or maintaining any "store," as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term "store," as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same "retail merchant," as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every "retail merchant" and "store," as defined herein, which is controlled or held with others by

majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and postoffice address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other

facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascer- [fol. 339] tain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for *any* pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

§ 5. If any retail merchant, as definied herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is

authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and upon conviction, shall be fined not exceeding Five Hundred ($500) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act,

or any prosecutions for any other infraction of the tax laws of this State.

§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or [fol. 340] shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at

law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitations of two years herein imposed.

§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

Approved March 17, 1930.

[fol. 341] [Endorsed:] Gross Retail Sales Tax Law of the State of Kentucky. Enacted by the General Assembly, Session 1930. Effective on and after March 17th, 1930. State Tax Commission, Frankfort, Ky.

[fol. 342] COMMONWEALTH OF KENTUCKY,
Frankfort, Ky.:

Office of Secretary of State

I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the foregoing bill has been

carefully compared with the original enrolled bill now in my official custody as Secretary of State and remaining on file in my office and found to be a true and correct copy of the enrolled bill passed by the General Assembly of Kentucky, 1930 Session, approved by the Governor March 17, 1930, and known as the Gross Retail Sales Tax Law.

In witness whereof I have hereunto set my hand and affixed my official seal.

Done at Frankfort this 5th day of February, 1931.

Ella Lewis, Secretary of State.

[Seal Commonwealth of Kentucky, Office of Secretary of State.]

[fol. 343] In United States District Court

Order Approving Statement of Evidence

It appearing that the herewith and foregoing statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all the evidence relevant and material to a hearing of questions to be presented on the appeal in said action,

It is, therefore, ordered that the same be allowed, settled and approved as a true, complete and correct statement of the evidence of said action.

Dated this 23 day of March, 1932.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 344] In United States District Court

Order Continuing Temporary Restraining Order, Etc.—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon.

Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harman Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	B. E. Willis,	I. O. Wolverson,
J. A. Gude,	T. B. Jones,	J. D. Delano,
L. M. Ross,	B. A. Alstrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 345] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for an interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the

introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 346] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and CLELL COLEMAN, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed Dec. 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of General Assembly of the Commonwealth of Kentucky, commonly known as the

Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from [fol. 347] its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the stat-

ute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized [fol. 348] by Section 10 against the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Fed-

eral Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 349] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hagar, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that [fol. 350] the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes

were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the state court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General [fol. 351] Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides

for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 352] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section

4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deductible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized [fol. 353] by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 354] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when

the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 355] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 356] In United States District Court

Decree—Dec. 9, 1931

This cause having been heard by consent of parties, together with the causes of Fred Levy et al., against the same defendants, and the J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking

Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any in-
[fol. 357] junctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be rea-

sonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, [fols. 358-360] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fols. 361-377] In United States District Court

Order Substituting Auditor of Public Accounts, etc.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 378 & 379] Bond on appeal for $1,000, approved and filed March 1, 1932, omitted in printing.

[fols. 380-395] Citation, in usual form, showing service on John B. Lewis et al., filed March 1, 1932, omitted in printing.

[fol. 396] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Kentucky, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Kentucky, before you, or some of you, in a cause between The Stewart Dry Goods Company, Plaintiff, and John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Member of the State Tax Commission of the Commonwealth of Kentucky, et al., etc., Defendants, wherein the decree of the said District Court, in favor of the said defendants, was duly entered in said cause on the 9th day of December, A. D. 1931, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated

herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, ad- [fol. 397] judged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the said Plaintiff, The Stewart Dry Goods Company, recover against the said Defendants Nine Hundred and Twenty-one Dollars and Fifteen Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy.

October 24, 1932.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 398] IN UNITED STATES DISTRICT COURT

ORDER FILING MANDATE—Entered December 10, 1932

This day came the parties, plaintiff and defendants, by their respective counsel, and on motion of plaintiffs, the mandate and opinion of the Supreme Court of the United States, reversing the orders and the final decree entered herein December 11, 1931, are filed of record, and pursuant to such mandate, it is now ordered and adjudged that the order and decree herein entered on December 11, 1931, be and every part thereof is hereby set aside, vacated and held for naught, and this cause is now reinstated upon the docket of the court for further proceedings in accordance with said mandate and the opinion of the Supreme Court.

By consent of parties, J. Dan Talbott, the present duly elected, qualified and acting Auditor of Public Accounts, is made defendant, individually and as such Auditor, in substitution for Clell Coleman, whose term of office has expired; and in like manner, W. P. Sullivan, at present a duly appointed, qualified and acting member of the State Tax Commission, in succession to Henry M. Cline, whose term [fol. 399] of office has expired, is made a party defendant, individually and as such member of the State Tax Commission, in substitution for said Henry M. Cline.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson

Trabue, Doolan, Helm & Helm, Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Pl'ff.

Bailey P. Wootton, Attorney General.

Dec. 10, 1932.

[fol. 400] IN UNITED STATES DISTRICT COURT

ORDER GRANTING INTERLOCUTORY INJUNCTION—Entered December 10, 1932

This day came the parties, plaintiffs and defendants, by their respective counsel, and the plaintiffs renewed their motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered,

ordered and adjudged that said motion be sustained and that the defendants and each of them be, and each of them is hereby, enjoined and restrained, until the further order of court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

[fol. 401] (2) From instituting or maintaining against the plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of court herein, continue in effect as to the plaintiffs and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of this cause by this Court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiffs, in the event the valid-
[fol. 402] ity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiffs or by any taxpayer entitled hereunder to the benefit of the interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety or by a pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties can not agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiffs or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiffs or by any one of said listed taxpayers entitled hereunder to the benefit of

the interlocutory injunction herein granted, or a bond secured as herein provided, or the making by the plaintiffs or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be canceled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities thereto-
[fol. 403] fore made by the plaintiffs, or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the persons respectively depositing same.

December 10, 1932.

Chas. I. Dawson, Judge.

Have seen.

Trabue, Doolan, Helm & Helm, Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plaintiff. Bailey P. Wootton, Atty. General. S. H. Brown, Assist. Atty. Gen. Francis M. Burke, Assist. Atty. Gen. Batson, Carey & Welch, Leslie W. Morris, Solicitors for Defts.

[fol. 404] IN UNITED STATES DISTRICT COURT

AGREED ORDER AMENDING ORDER GRANTING INJUNCTION—
Entered December 20, 1932

By agreement of parties, it is now ordered that the order entered herein on December 10, 1932, granting an interlocutory injunction, be amended in the following particulars only:

(1) Plaintiffs or those taxpayers herein who have hitherto given bond for the payment of taxes accruing from sales for the calendar years 1930 and 1931 may, if they, or any of them, so elect, continue said bonds in force, and may give an additional bond for the estimated taxes accruing from sales made in the year 1932, said additional bond to be in all respects as required in said order of December 10, 1932, except as herein limited.

(2) Said bonds for the taxes accruing from sales for the calendar years 1930 and 1931 shall, in the event the taxpayer so elects, be and remain in full force and effect unless

substituted bonds for the three years' taxes be filed in lieu thereof.

Dec. 20, 1932.

Chas H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Bailey P. Wootton, Attorney for Defendants. Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

[fol. 405] IN UNITED STATES DISTRICT COURT

In Equity. No. 609

AMENDMENT TO BILL OF COMPLAINT—Filed February 18, 1933

The plaintiff, by leave of Court, amends its bill of complaint herein in respect to the matters hereinafter set out, and by way of amendment now makes the following averments:

Paragraph I

Amending Paragraph X of its original bill of complaint, plaintiff repeats the averments contained therein, and in addition thereto states:

That for the calendar year 1931 plaintiff has paid to the Commonwealth of Kentucky, in addition to the payment of its annual ad valorem taxes and excluding similar taxes paid for prior years, the following special State licenses, excises, occupational and corporation license taxes, to wit:

Corporation license taxes	$989.78
Other license taxes	68.00
Automobile license taxes	350.07
Total	$1,407.85

That for the calendar year 1932 plaintiff has paid to the Commonwealth of Kentucky, in addition to the payment of its annual ad valorem taxes and excluding similar taxes paid for prior years, the following special State licenses, excises, occupational and corporation license taxes, to wit:

Corporation license taxes	$929.40
Other license taxes	68.00
Automobile license taxes	350.00
Total	$1,347.40

[fol. 406] Paragraph II

Amending Paragraph XIII of its original bill of complaint, plaintiff repeats the averments therein contained with respect to the calendar year 1930, and further states:

That during the calendar year 1931 the total gross retail sales made by this plaintiff, in all departments conducted by it in its retail store, aggregated $3,618,126.00.

Applying to said gross sales claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the rates of taxation prescribed by said challenged Act, and taking the credits allowed by Section 4 of said challenged Act, would produce the following result in taxes claimed of this plaintiff for the calendar year 1931:

1/20 of one per cent on first $400,000 of sales	$200.00 tax
2/20 of one per cent on next $100,000 of sales	100.00 tax
5/20 of one per cent on next $100,000 of sales	250.00 tax
8/20 of one per cent on next $100,000 of sales	400.00 tax
11/20 of one per cent on next $100,000 of sales	550.00 tax
14/20 of one per cent on next $100,000 of sales	700.00 tax
17/20 of one per cent on next $100,000 of sales	850.00 tax
One per cent on excess over $1,000,000 of sales	26,181.26 tax
Total tax above computed	$29,231.26
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	1,407.85
Net tax demanded of plaintiff for 1931	$27,823.41

That during the calendar year 1932 the total gross retail sales made by this plaintiff in all departments conducted by it in its retail store aggregated $2,812,683.00.

Applying to said gross sales for 1932, claimed by defendants to be subject to taxation under said challenged Act, the rates of taxation thereby prescribed, and taking the credits allowed by Section 4 of said challenged Act, would produce the following result in taxes claimed of this plaintiff for the calendar year 1932:

[fol. 407]

1/20 of one per cent on first $400,000 of sales	$200.00	tax
2/20 of one per cent on next $100,000 of sales	100.00	tax
5/20 of one per cent on next $100,000 of sales	250.00	tax
8/20 of one per cent on next $100,000 of sales	400.00	tax
11/20 of one per cent on next $100,000 of sales	550.00	tax
14/20 of one per cent on next $100,000 of sales	700.00	tax
17/20 of one per cent on next $100,000 of sales	850.00	tax
One per cent on excess over $1,000,000 of sales	18,126.83	tax
Total tax above computed	$21,176.83	
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	1,347.40	
Net tax demanded of plaintiff for 1932	$19,829.43	

Paragraph III

Amending Paragraph XIV of its original bill of complaint, the plaintiff repeats the averments therein contained with respect to the calendar year 1930, and states:

That the same averments apply in full force and effect and are hereby restated by this plaintiff with respect to its gross sales in each of the calendar years 1931 and 1932 and with respect to the taxes exacted of plaintiff for each of said years 1930, 1931 and 1932, under the Act assailed in its original bill of complaint.

Paragraph IV

Amending Paragraph XV of its original bill of complaint, this plaintiff repeats all the averments contained in said paragraph with respect to the operation of said Act during each of the calendar years 1930, 1931 and 1932, and with respect to the unjust and unequal discrimination effected by said Act between the plaintiff and the 25 other taxpayers listed of record as similarly situated and as protected by orders of Court herein, on the one hand, and from 20,000 to 25,000 other competing retail merchants conducting a general retail store in Kentucky, on the other hand.

In addition thereto, plaintiff states that in its actual operation for the years 1930 and 1931, said challenged Act of 1930 has in fact produced the following results, as disclosed by the records of the State Tax Commission of Kentucky, which afford complete returns from all taxpayers [fol. 408] with the exception of plaintiff and others listed by order of Court herein as entitled to the benefits of this litigation and of the restraining order heretofore granted herein:

Aside from the plaintiff and the 25 other taxpayers in the several classes represented in this litigation and protected by the restraining orders issued herein, it appears from the records of the State Tax Commission that there are or were in the State of Kentucky 24,096 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,084 retail merchants who were required to and did make reports to said Commission for the calendar year 1931.

The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, down to and including December 2, 1932:

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1930

Number of Reports filed by Retail Merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	24,061	16,374	7,687
Retail sales between $400,000 and $500,000	13	7	6
Retail sales between $500,000 and $600,000	8	5	3
Retail sales between $600,000 and $700,000	5	4	1
Retail sales between $700,000 and $800,000	4	2	2
Retail sales between $800,000 and $900,000	1	0	1
Retail sales between $900,000 and $1,000,000	0	0	0
Retail sales in excess of $1,000,000	4	3	1
Totals	24,096	16,395	7,701

Statement Showing Number of Retail Merchants Reporting for the Year 1930 Classified by Amounts of Tax Paid Pursuant to Reports

Number of taxpayers reporting tax less than 50¢	2,630
Number of taxpayers reporting tax 50¢ to $1.00	2,187

[fol. 409]

Number of taxpayers reporting tax $1.00 to $2.00	2,743
Number of taxpayers reporting tax $2.00 to $3.00	1,750
Number of taxpayers reporting tax $3.00 to $4.00	1,186
Number of taxpayers reporting tax $4.00 to $5.00	889
Number of taxpayers reporting tax $5.00 to $10.00	2,046
Number of taxpayers reporting tax $10.00 to $15.00	816
Number of taxpayers reporting tax $15.00 to $20.00	429
Number of taxpayers reporting tax $20.00 to $25.00	342
Number of taxpayers reporting tax $25.00 to $50.00	495
Number of taxpayers reporting tax $50.00 to $100.00	175
Number of taxpayers reporting tax $100.00 to $200.00	60
Number of taxpayers reporting tax $200.00 to $300.00	6
Number of taxpayers reporting tax $300.00 to $400.00	4
Number of taxpayers reporting tax $400.00 to $500.00	1
Number of taxpayers reporting tax $500.00 to $600.00	0
Number of taxpayers reporting tax $600.00 to $700.00	2
Number of taxpayers reporting tax $700.00 to $800.00	1
Number of taxpayers reporting tax over $1,000,000	3
Total	15,765
Undetermined and unclassified	630
Total	16,395

Number of Merchants reporting sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,784	5,353
$10,000.00 and under $25,000.00	4,439	1,553
$25,000.00 and under $50,000.00	1,905	507
$50,000.00 and under $75,000.00	596	148
$75,000.00 and under $100,000.00	241	45
$100,000.00 and under $150,000.00	216	40
$150,000.00 and under $200,000.00	90	19
$200,000.00 and under $250,000.00	48	12
$250,000.00 and under $300,000.00	27	3
$300,000.00 and under $400,000.00	36	7
Over $400,000.00	21	14
Total	16,395	7,701

Analysis of reports showing tax liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Sales less than $400,000	24,061	$338,870,755.00	$167,214.07	$78,211.02	$89,003.05	$222,674.01
Sales between $400,000 and $500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	5,709.42
Sales between $500,000 and $600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Sales between $600,000 and $700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Sales between $700,000 and $800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Sales between $800,000 and $900,000	1	814,559.00	636.15	636.15	0	1,755.24
Sales between $900,000 and $1,000,000	0	0	0	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Total	24,096	$361,521,522.00	$207,614.03	$101,488.80	$106,125.23	$243,513.99

[fol. 410]

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1931

Number of reports filed by Retail Merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	20,053	11,992	8,061
Retail sales between $400,000 and $500,000	10	6	4
Retail sales between $500,000 and $600,000	9	6	3
Retail sales between $600,000 and $700,000	3	3	0
Retail sales between $700,000 and $800,000	2	1	1
Retail sales between $800,000 and $900,000	3	2	1
Retail sales between $900,000 and $1,000,000	2	2	0
Retail sales in excess of $1,000,000	2	2	0
Totals	20,084	12,014	8,070

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Sales less than $400,000	20,053	$286,786,721.00	$143,464.51	$77,551.95	$65,912.56	$173,735.79
Sales between $400,000 and $500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Sales between $500,000 and $600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Sales between $600,000 and $700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Sales between $700,000 and $300,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Sales between $800,000 and $900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Sales between $900,000 and $1,000,000	2	1,895,680.00	5,218.29	1,084.94	4,128.35	.....
Sales in excess of $1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,084	$306,429,614.00	$174,771.24	$90,491.51	$84,279.73	$186,040.99

[fol. 411] Paragraph V

Amending Paragraph XXVIII of its original bill of complaint, plaintiff repeats the averments therein contained, and in addition thereto, it makes the following averments:

For more than ten years past there has been a constantly increasing deficit in said General Fund, which has been continuously during said period, and is now, wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

By Section 4688a-1, a-2 and a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, and in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued and as money appropriated and available for the purposes of the General Fund reaches the treasury.

The effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time shall be paid in priority to warrants drawn later in point of time, and if the [fol. 412] payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

By Section 4688a-1, Kentucky Statutes, it is provided that the State Treasurer shall receive and redeem warrants issued against the Auditor

"if there be sufficient money in the treasury appropriated for that purpose."

If there is no money in the General Fund available for the payment of such warrants in the order prescribed by law, the State Treasurer can not pay such warrants, and the Courts can not by mandamus compel him to pay same, as was held by the Court of Appeals of Kentucky in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of warrants *theretofore* outstanding was to enact the challenged [fol. 413] law and therein to appropriate *one-half* the taxes exacted thereunder, to the payment of the *then* existing indebtedness of the Commonwealth, it being *already* provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor

accounts, was $12,565.81, as against which Fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At its 1932 session the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

"An act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State treasury available for the payment of such warrants, or any part thereof.

(3) That some of such warrants have been issued and outstanding for approximately five years.

[fol. 414] In State Budget Commission v. Lebus, 244 Ky. 701, 714, the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiff might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it can not be collected with reasonable or any promptness, and they can not be sold except at a discount of from 10 to 15 per cent of their face value.

This fact has been recognized by the defendants herein, [fol. 415] members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, and that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers were not offer-

ing 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiff states that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Plaintiff says that no State warrants against the General Fund have been called for payment that have been issued since July 31, 1927; and in his deposition, given at the time and place and in the case above referred to, the defendant Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called [fol. 416] for warrants that had been issued between June 12, 1927, and July 1, 1927, inclusive.

On the average, throughout the last eight or ten years, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years after issue thereof, on account of the lack of funds legally available therefor. The only exceptions to this general rule are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Had the plaintiff herein paid the taxes exacted of it under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiff herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiff would not have had at the time of filing this bill, and it has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Fi- [fol. 417] nance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticised

"the utter disregard of the General Assembly in late years for a balance budget,"

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be

levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

[fol. 418] Paragraph VI

Amending Paragraph XXIX of its original bill, plaintiff repeats the averments therein contained and extends such averments to include and apply to taxes and penalties claimed of plaintiff on account of its gross sales for the calendar years subsequent to 1930, the amounts of such gross sales and resulting taxes being set forth in Paragraph II of this amendment.

Wherefore, having amended its bill in the respects hereinbefore set forth, plaintiff prays as in its original bill of complaint, and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

Duly sworn to by Robert J. McKim. Jurat omitted in printing.

[fol. 419] In United States District Court

In Equity. No. 609

Answer to Amendment to Bill of Complaint—Filed April 14, 1933

Come the defendants and by leave of court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, for answer to same plead as follows, to-wit:

Paragraph I

Defendants say that they repeat all of the averments, denials, and statements contained in their answer to Paragraph X of the original bill of complaint, and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief, and therefore neither admit nor deny the allegations contained in the second literary paragraph of paragraph I of the amendment to said original paragraph, but require strict proof thereof.

Paragraph II

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof [fol. 420] thereof.

Paragraph III

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph IV

Defendants repeat all of the averments and denials contained in their answer to Paragraph XV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph V

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXVIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

For further answer defendants deny that for more than ten years past, or at all, there has been a constantly increasing deficit in the General Fund of the Commonwealth, or that same has been continuous during said period or at

all, or is now insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it, or that by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years or at all, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

Defendants deny that in addition thereto or at all there are many other undisputed claims against the General [fol. 421] Fund, or that such claims have been held up for a long period of time in the office of the Auditor of Public Accounts, or that no warrants have been issued by the Auditor although such claims are properly allowable or payable, or are allowable or payable, out of the General Fund. Deny that without a prolonged or expensive accounting, it is impossible to state the amount of such claims for which warrants have been issued, or that they aggregate a large or any sum of money, or that they amount to many thousands of dollars or any dollars.

Deny that by Sections 4688a-1, a-2, or a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, or in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, or that in any case, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued or as money appropriated or available for the purposes of the General Fund reaches the treasury.

They further deny that any moneys paid in to the General Fund from the operation of the Act in question will have to be paid out or refunded with regard to other monies in such fund.

Deny that the effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time should be paid in priority to warrants drawn later in point of time, or that if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

Deny that at the time the challenged act was in process of enactment, or at any time, that it was a fact, or that such

a fact was well known, to the members of the General Assembly or to the officials of the State, or to any one, that warrants drawn against the General Fund for the refund of taxes, as prescribed in said Act, could not and would not be paid out of said fund for several years, or that there was [fol. 422] any delay in the payment of said refund, and state that said refunds were always and have been always promptly paid.

Deny that knowing these facts, or that such were the facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund, but say that the General Assembly did augment the General Fund by the Act in question. Deny that the only provision for the payment of warrants theretofore outstanding was to enact the challenged law or therein to appropriate one-half the taxes exacted thereunder for the payment of the then existing indebtedness of the Commonwealth, or that there was any existing indebtedness, or that it was only provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

They say that other laws were passed which were calculated to and did bring vast sums of revenue, which revenue was paid into the General Fund.

Defendants deny that at the time these suits were brought, or at all, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, or at all, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931 less minor accounts, was $12,565.81, or that as against said Fund there was at the time outstanding warrants theretofore issued aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts, or had been presented for payment, or were not paid for lack of funds.

Deny that the 1932 Session of the General Assembly of Kentucky recognized or declared the insolvency of the General Fund or its insufficiency to pay outstanding warrants issued against the Auditor of Public Accounts, or for that reason it enacted Chapter 20 of the Session Acts of 1932.

[fol. 423] Deny that the facts with respect to the condition of the General Fund are now, or for years past, or at all, have been as above declared by the General Assembly in the Acts hereinbefore set forth, or that the deficit in

the General Fund has shown a progressive increase or there is no prospect of such deficiency being reduced.

Deny that since the adjournment of the 1932 General Assembly, or at all, the deficit in the General Fund has increased, or as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11, or any sum, or that as of October 31, 1932, or there was no money whatever in the General Fund, or that on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48, or at all, or in any sum, or that by reason of the facts above alleged, or at all, upon or against the General Fund which plaintiff might obtain under such intention of the challenged act, at the end of any litigation as authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

Deny that by reason of such insolvency of the General Fund, Warrants drawn against it can not be collected with reasonable- or with promptness, or that they can not be sold except at a discount of 10% or any per cent of their face value.

Deny that said fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

[fol. 424] Deny that in said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State Warrants against the General Fund, or that such warrants on such market were worth 87 to 88 cents on the dollar, or that there was not a ready market for them at any price, or his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, or at all, outstanding warrants would sell at 75 per cent of face value.

Defendants state that in any event said warrants have never reached the price above indicated, but now are selling between 95 cents and 100 cents on the dollar.

Deny that in like manner or at all the defendant, John B. Lewis, at the same time and place stated under oath that the last sale of State Warrants that he knew of was made at 90 cents on the dollar; or that he heard they were not offering 90 then, or were offering a little less than that.

Deny that he also stated that in the event said Funding Act should be held invalid, the warrants would go considerably lower, or that he believed they would go below 75 cents on the dollar of face value.

Deny that it is extremely difficulty to find a purchaser for State Warrants drawn by the Auditor of Public Accounts against the General Fund of the State, or that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value, but state upon the other hand, such warrants have a ready sale at from 95 cents to par, and the same are regarded as a prime investment.

[fol. 425] Defendants deny that no state warrants against the General Fund have been called for payment that have been issued since July 31, 1927, or that in his deposition, given at the time and place and under oath, stated that the last call of warrants was made as of July 8, 1931, or that he called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that on the average, throughout the last eight or ten years, or at all, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years, or at all, after issue thereof, on account of the lack of funds legally available thereof, or the only exceptions are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Deny that had the plaintiff herein paid the taxes exacted of it under the challenged act as and when due in February, 1931, and February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as provided in section 10 of the challenged Act, the plaintiff herein, under the law of the State, as construed or applied by the Court of Appeals, would have been compelled ever since to hold said warrants for years to come, or at all, un-

paid or to endeavor to sell same at a great or any discount, in addition to the loss of interest on said tax money, or that there would be any loss of interest on said tax money, or that plaintiff did not have had at the time of the filing of this bill, or has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged act, or any other Act of the Commonwealth of Kentucky.

Deny that the Commonwealth of Kentucky itself, under the advice of its Attorney General, or at all, declined to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as payment of [fol. 426] jurors in the circuit courts of the State, or that in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials.

Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932; or that there is any overdraft in the General Fund as of November 1, 1932, or at all.

Deny that in the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, or the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund for the year of over $2,500,000.00",

thus adding to the deficiency in said fund theretofore existing.

Deny that in said report the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

or added:

"Since this law-making body holds the power of appro [fol. 427] priating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXIX of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph VII

Defendants repeat, reiterate, and rely upon each and every defense made in their original action.

Wherefore, defendants pray as in their original answer Bailey P. Wootton, Attorney General. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General. Batson, Cary & Welch, Louisville, Kentucky. Leslie W. Morris, Frankfort, Kentucky, of counsel.

[fol. 428] In United States District Court

Second Amended Answer—Filed July 6, 1933

Come the defendants, by leave of Court, and for further answer to plaintiff's petition, as amended, plead as follows:

Paragraph I

Defendants say that plaintiff has a plain, adequate, complete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the

court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

[fol. 429]

For the fiscal year ending June 30,	1926	$ 7,706,538.28
" " " " " " "	1927	8,059,517.85
" " " " " " "	1928	9,294,798.97
" " " " " " "	1929	9,907,769.29
" " " " " " "	1930	12,949,027.10
" " " " " " "	1931	11,573,065.01
" " " " " " "	1932	10,000,000.00 (approximately)
" " " " " " "	1933	9,000,000.00 (approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph II

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended

herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient ot constitute a valid cause of action.

Wherefore defendants pray as in their original answer.

Bailey P. Wootton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General. Batson, Cary & Welch, Louisville, Kentucky. Leslie W. Morris, Frankfort, Kentucky.

[fol. 430] IN UNITED STATES DISTRICT COURT

No. 609

STIPULATION AS TO HEARING—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore taken and filed and heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

[fol. 431] All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on

account of the ex parte character thereof, are waived, and all formalities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation, all the evidence offered or heard in this case or in the case of Kroger Grocery and Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of Fred Levy, et al. v. John B. Lewis, et al., No. 610, and J. C. Penney Company v. John B. Lewis, et al., No. 611, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before the 10th of June, 1933, each party shall give to the adverse party or parties a written notice specifying the ex parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, Bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates below given.

(a) the balance to credit of General Fund, and

(b) outstanding warrants against the General Fund as follows:

[fol. 432]

Date	Balance to credit of general fund	Outstanding warrants against general fund
June 30, 1922	$297,967.85	$4,702,709.11
June 30, 1923	2,590,470.14	5,947,750.40
June 30, 1924	167,535.74	4,089,151.37
June 30, 1925	310,242.68	4,127,746.17
June 30, 1926	10,387.44	4,329,772.33
June 30, 1927	257,566.83 (Deficit)	4,664,820.89
June 30, 1928	440,328.14	6,715,347.99
June 30, 1929	1,880,084.77	8,060,920.69
June 30, 1930	1,826,244.05	8,533,384.79
Dec. 31, 1930	1,250,168.22	9,880,501.76
June 30, 1931	2,440,128.46	11,023,911.53
Dec. 31, 1931	838,269.63	12,637,990.48
June 30, 1932	1,302,267.69	13,851,414.57
Dec. 31, 1932	573,831.32	14,415,503.69
May 25, 1933	1,898,229.25	14,668,744.57

(7) It is understood that neither side shall be required to produce for cross-examination by the adverse party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, S. H. Brown, Solicitors for Defendants.

[fol. 433] In United States District Court

Order Substituting Party Defendant—Entered August 21, 1933

This day came the parties herein and filed a stipulation noting that the defendant Seldon R. Glenn had resigned as a member of the State Tax Commission of Kentucky and was no longer a member of the said State Tax Commission, and was succeeded therein by Emerson Beauchamp.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that Emerson Beauchamp, member of the [fol. 434] State Tax Commission of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant Selden R. Glenn, and with the same effect as if he had been originally a defendant to the Bill of Complaint herein, and said cause is continued and maintained against the said Emerson Beauchamp individually and as a member of the State Tax Commission of the Commonwealth of Kentucky.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 435] In United States District Court

Order of Submission—Entered August 21, 1933

This day the above-styled three cases came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants pending in the Eastern District of Kentucky, and heard at the same time.

By agreement of parties plaintiff and defendant, the proof heard and all exhibits filed as set out in the order of submission herein, dated February 14, 1931, was likewise read and heard upon he final submission hereof, together with the stipulation filed in these cases in the Clerk's office on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of W. P. Sullivan, W. R. Robinson, A. H. Brendel, Albert H. Morrill, Harry W. Schacter.

[fol. 436] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Stat., Sec. 3688a-1, a-2 and a-4,
Rhea, Treas., v. Newman, 153 Ky. 604,
Bosworth, Treas., v. Shuck, 118 Ky. 458,
Chap. 13 of the Acts of the General Assembly of Ky. of 1926,
Chap. 20 of the Acts of the General Assembly of Ky. of 1932,
State Budget Commission v. Lebus, 244 Ky. 701,

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of Jerry King, James W. Martin, Clyde William Phelps, Selden R. Glenn, R. C. Ilg, Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted, and the Court not being fully advised takes time.

It is further ordered and adjudged that the interlocutory injunctions heretofore entered in each of the above-styled cases be and the same are hereby continued in full force and

effect until the final determination of each of the above-styled cases in this Court.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Aug. 21, 1933.

Have seen the foregoing order.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. Gen., S. H. Brown, Assist. Atty. Gen., Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 437] IN UNITED STATES DISTRICT COURT

ORDER FILING EXHIBIT—Entered August 21, 1933

Upon certification of the official stenographer of the question of the introduction of the tax return under the Gross Sales Tax Law of the D. T. Bohon Company, filed with the State Tax Commission on September 8, 1931, it is hereby ordered that said return be filed as an exhibit in these cases for such consideration as the court may deem proper.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Aug. 21, 1933.

[fol. 438] IN UNITED STATES DISTRICT COURT

ORDER APPROVING SUPPLEMENTAL STATEMENT OF EVIDENCE—Entered September 20, 1934

It appearing that the herewith and foregoing supplemental statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all the supplemental evidence relevant and material to the hearing of questions to be presented on the appeal in said action, the original statement of evidence upon the former appeal of this action

having been already approved and made a part of the record by order dated March 23, 1932,

It is, therefore, ordered that the said supplemental statement of evidence be allowed, settled and approved as a true, complete and correct statement of the evidence of said action supplemental to the original statement of evidence heretofore, and now, approved.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

Sept. 20, 1934.

[fol. 439] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT.

SUPPLEMENTAL STATEMENT OF EVIDENCE—Filed Sept. 20, 1934

W. P. Sullivan

W. P. SULLIVAN, called for plaintiff, testified as follows:

He was a member of the State Tax Commission since March, 1932. Prior to that time he had been Cashier of the Farmers Deposit Bank of Frankfort and had been connected with the bank for about 20 years. As a result of his experience he was able to state the market value of Kentucky State warrants issued against the general fund. He stated that State warrants sold at par until three or four years prior to the giving of his testimony which occurred on May 29, 1933. During the last three years preceding the time his deposition was taken he had seen warrants sell as low as 85. They were selling at 92 the day of his testimony.

In 1930 State warrants issued in 1925 were purchased by him and at that time he paid 97½, plus accrued interest. He thought they sold between 90 and 100 during the year 1931 and they went as low as 85 in 1932. They did not stay at 85 very long but went back to 96 in 1932.

[fol. 440] There was no cross-examination.

W. R. Robinson

W. R. ROBINSON, called for the plaintiff, testified as follows:

He was 33 years old and resided at Frankfort, Kentucky, and was supervisor of the Gross Sales Tax Department of the State of Kentucky, having acted as such since August, 1932. His predecessor in office was Joseph Martin, who at the time the testimony was taken was no longer employed by or on behalf of the State of Kentucky. Mr. Robinson was acquainted with A. H. Brendel, an accountant residing at Cincinnati, Ohio. The latter had done work under the supervision and with the permission of Mr. Robinson which work consisted of checking over the returns and making an analysis of the retail sales tax returns. Mr. Brendel had only been in the department once since Robinson had been in charge but prior to that time Brendel was there twice to Mr. Robinson's knowledge. Mr. Robinson was assistant supervisor at the time Martin was in charge of the department.

Mr. Brendel checked the records from the receipt books. These receipts show the amount of sales, the gross sales, the exemptions and the amount of tax paid. The witness thereupon produced some books and identified them as the receipt books which were made available for examination by Mr. Brendel. He thereupon stated that these books contained the information as to the amount of the tax, who made the return and the amount paid. They also showed exemptions and deductions allowable under the law. He testified that Mr. Brendel had access to the returns themselves but he did not know whether Brendel used them or not. The witness then produced some of the actual returns which were reports for current years, being reports for the calendar year ending December 31, 1932.

[fol. 441] The witness had checked one of the reports made by Brendel and he found it to be accurate with a few minor errors. The particular analysis which he checked was the one for the year 1930, covering returns filed during the period ending December 2, 1932.

The witness then stated that the paper which he had filed showed that reports showing retail sales in excess of one million dollars were filed to the number of four, three indicating a tax and one indicating no tax.

The witness then produced the tax return for D. T. Bohon Company for the year 1930.

The witness was thereupon asked several questions about the return. Upon the advice of the Assistant Attorney

General he declined to reply to the questions. He also declined to produce the reports for the same company for the years 1931 and 1932.

The question of whether the particular report could be introduced as an exhibit was certified to the United States District Court, which court subsequently ruled in favor of the plaintiff and the report was introduced. It is attached hereto and marked Exhibit #1 Robinson.

There was no cross-examination.

(Here Follows Exhibit Robinson No. 1, Side Folios 442 and 443)

EXHIBIT ROBINSON NO. 1

284A

Sales—1

Report of Gross Retail Sales

For The Year Ending December 31st, 19____

TO BE FILED ON OR BEFORE FEBRUARY 1ST, 19____, WITH

State Tax Commission, Frankfort, Ky.

For Use of State Tax Commission Only
Date Rec'd
Am't Remitted $
Audited by

FILED

Name of Merchant
Address of Principal Office
Name and Address of ~~Owner or~~ President
Is Owner Individual, Partnership or Corporation?
If Corporation, Date Incorporated ____ In What State?
Nature and Kind of Business ____ When Begun
Was Business Discontinued During Year? ____ If so, When?
Number of Stores Operated in This State

Location of Each Store	Name and Address of Officer or Agent in Charge of Each Store	Gross Sales of Each Store
		$
		$
		$
		$

TOTAL GROSS RETAIL SALES OF ALL KENTUCKY STORES $

DEDUCT TOTAL SALES OF GASOLINE AND PRESCRIPTION WHISKEY $

TOTAL GROSS RETAIL SALES SUBJECT TO TAX $

CALCULATION OF TAX

Amount of Sales not over $400,000	$	@ 1/20 of 1% or 5c on the $100	$
Amount of Sales over $400,000 but not over $500,000	$	@ 2/20 of 1% or 10c on the $100	$
Amount of Sales over $500,000 but not over $600,000	$	@ 5/20 of 1% or 25c on the $100	$
Amount of Sales over $600,000 but not over $700,000	$	@ 8/20 of 1% or 40c on the $100	$
Amount of Sales over $700,000 but not over $800,000	$	@ 11/20 of 1% or 55c on the $100	$
Amount of Sales over $800,000 but not over $900,000	$	@ 14/20 of 1% or 70c on the $100	$
Amount of Sales over $900,000 but not over $1,000,000	$	@ 17/20 of 1% or 85c on the $100	$
Amount of Sales over $1,000,000	$	@ 1% or $1.00 on the $100	$

TOTAL AMOUNT OF TAX $

Credit by Amount of State Corporation License $ OK

Credit by Amount of State Occupational License (See Instruction Sheet, Rule 7) $

NET AMOUNT OF TAX $

Make Check for Amount of Tax Payable to State Treasurer and Mail with Report

(Over)

442

No. 16492

REPORT
OF
GROSS RETAIL SALES

C. T. Bohon Company

Hartford

Ohio

For the Year Ending Dec. 31, 1926

To be Filed on or Before
February 1st, Following Close of
Year for Which Report is Made.

TOTAL GROSS SALES ..... $ 46.15.00

AMOUNT OF TAX ..... $ Collected
subsequently

State Tax Commission
FRANKFORT, KY.

443

STATE OF Kentucky

COUNTY OF Ohio

I, Hardy Bohon, do solemnly swear that the statements contained in this report are true to the best of my knowledge and belief.

Hardy Bohon, Pres.
Name Title

Subscribed and sworn to before me by Hardy Bohon this 1st day of Feb., 1927.

C. L. Page.

Notary Public, State at Large
My commission expires Jan. 7, 1930.

A. H. Brendel

A. H. BRENDEL, called for the plaintiff, testified as follows:

He resided at Cincinnati, Ohio, and was 49 years of age; was a partner in the firm of J. D. Cloud & Company, Certified Public Accountants. He had made an analysis of the returns from the files of the State Tax Department of the State of Kentucky. He had been in Frankfort about six times to make this analysis. Some times he spent a few days there and at times he was there as long as six weeks. Approximately six men worked under him in making the analysis. He had been a certified public accountant since [fol. 444] 1912. The first time that he went to Frankfort was in February, 1931. At that time Joseph Martin was supervisor of the Gross Sales Tax Department and cooperated with Mr. Brendel in making the analysis. A joint report was made to the Attorney General and to Judge Wood, counsel for the plaintiff. The witness thereupon identified a copy of the first report. Originally, compilations were made directly from the returns filed by the taxpayers but later the State Department adopted a form of receipt book and then he made his compilations from the stubs of the receipt. All analyses were made under his personal supervision, the last one having been made in April 1933. This one included the compilations made on his previous visits. The witness thereupon produced the report made as a result of his examination on April 17, 1933 for tax returns filed for the year 1930. This was introduced and marked "Brendel Exhibit No. 1." The witness examined the exhibit and stated that it was a correct analysis of the Kentucky Gross Retail Sales for 1930 and covered all returns filed during the period from the inauguration of the tax to April 17, 1933.

Similar reports had been made for the years 1931 and 1933. The witness thereupon identified the 1931 report which was offered in evidence and received as Brendel's Exhibit No. 2, and the 1932 report which was identified as Brendel's Exhibit No. 3. The witness stated that Exhibit 2 was a correct compilation of returns filed up to April, 1933. The same was true with regard to the analysis for 1932.

There was no cross-examination.

[fol. 445] EXHIBIT BRENDEL #1

[fol. 446] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930

Filed During the Period from the Inauguration of the Tax to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 447] April 21, 1933.

Hon. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1930 filed during the period from December 2, 1932, to and including April 17, 1933, which together with our previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930 filed during the period from the Inanguration of the Tax to April 17, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1930 from the Inauguration of the Tax to April 17, 1933, classified by Amounts of Tax Paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability, for the year 1930 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of Taxpayers classified as to the amount of tax paid by each taxpayer.

The information contained in this report was obtained by us in the following manner:

For returns for the year 1930 filed during the period from the inauguration of the tax to May 18, 1931, from an inspection of the tax returns:

For returns for the year 1930 filed during the period from May 19, 1931, to July 21, 1931, from a report submitted to us by J. Martin, Supervisor of the Kentucky Gross Retail Sales Tax Department;

[fol. 448] For returns for the year 1930 filed during the period from July 22, 1931 to April 17, 1933, from the duplicate copy of the receipt issued to the taxpayer.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 449.)

[fol. 449]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed D

Number of Reports Filed by Retail Merchants—	Number filed	Num indic t
Showing Retail Sales less than $400,000	24,128	16,
Showing Retail Sales between 400,000 and 500,000	13	
Showing Retail Sales between 500,000 and 600,000	8	
Showing Retail Sales between 600,000 and 700,000	5	
Showing Retail Sales between 700,000 and 800,000	4	
Showing Retail Sales between 800,000 and 900,000	1	
Showing Retail Sales between 900,000 and 1,000,000	0	
Showing Retail Sales in excess of $1,000,000	4	
Totals	24,163	16,

Analysis of Reports Showing Tax Liability—	Number of returns
Showing Sales less than $4,000	24,128
Showing Sales between 400,000 and 500,000	13
Showing Sales between 500,000 and 600,000	8
Showing Sales between 600,000 and 700,000	5
Showing Sales between 700,000 and 800,000	4
Showing Sales between 800,000 and 900,000	1
Showing Sales between 900,000 and 1,000,000	0
Showing Sales in excess of $1,000,000	4
Totals	24,163

Number of Merchants Reporting Sales of—	Showing tax liability	Sho no liab
Less than $10,000	8,808	5,
$ 10,000 and under $ 25,000	4,436	1,
25,000 and under 50,000	1,911	
50,000 and under 75,000	596	
75,000 and under 100,000	242	
100,000 and under 150,000	217	
150,000 and under 200,000	91	
200,000 and under 250,000	48	
250,000 and under 300,000	28	
300,000 and under 400,000	36	
Over $400,000	21	
Totals	16,434	7,

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SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed During the Period from the Inauguration of the Tax to April 17, 1933

mber of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	24,128	16,413	7,715
Showing Retail Sales between 400,000 and 500,000	13	7	6
Showing Retail Sales between 500,000 and 600,000	8	5	3
Showing Retail Sales between 600,000 and 700,000	5	4	1
Showing Retail Sales between 700,000 and 800,000	4	2	2
Showing Retail Sales between 800,000 and 900,000	1	0	1
Showing Retail Sales between 900,000 and 1,000,000	0	0	0
Showing Retail Sales in excess of $1,000,000	4	3	1
Totals	24,163	16,434	7,729

lysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Showing Sales less than $4,000	24,128	340,197,497.00	167,880.34	78,659.58	89,220.76	226,979.91
Showing Sales between 400,000 and 500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Showing Sales between 500,000 and 600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Showing Sales between 600,000 and 700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Showing Sales between 700,000 and 800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Showing Sales between 800,000 and 900,000	1	814,559.00	636.15	636.15	0	1,795.24
Showing Sales between 900,000 and 1,000,000	0	0	0	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Totals	24,163	362,848,264.00	208,280.30	101,937.36	106,342.94	247,819.89

nber of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than $10,000	8,808	5,374
$ 10,000 and under $ 25,000	4,436	1,556
25,000 and under 50,000	1,911	508
50,000 and under 75,000	596	149
75,000 and under 100,000	242	45
100,000 and under 150,000	217	41
150,000 and under 200,000	91	20
200,000 and under 250,000	48	12
250,000 and under 300,000	28	3
300,000 and under 400,000	36	7
Over $400,000	21	14
Totals	16,434	7,729

[fol. 450] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1930 Classified by Amount of Tax Paid, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of taxpayers reporting tax less than 50¢	2,640
" " " " " 50c to 1.00	2,192
" " " " " 1.00 to 2.00	2,748
" " " " " 2.00 to 3.00	1,754
" " " " " 3.00 to 4.00	1,187
" " " " " 4.00 to 5.00	890
" " " " " 5.00 to 10.00	2,054
" " " " " 10.00 to 15.00	818
" " " " " 15.00 to 20.00	431
" " " " " 20.00 to 25.00	342
" " " " " 25.00 to 50.00	495
" " " " " 50.00 to 100.00	176
" " " " " 100.00 to 200.00	60
" " " " " 200.00 to 300.00	6
" " " " " 300.00 to 400.00	4
" " " " " 400.00 to 500.00	1
" " " " " 500.00 to 600.00	....
" " " " " 600.00 to 700.00	2
" " " " " 700.00 to 800.00	1
Over $1,000.00	3
Total	15,804
Undetermined and unclassified	630
	16,434

[fol. 451] EXHIBIT BRENDEL #2

[fol. 452] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931

Filed During the Period from December 7, 1932, to April 18, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 453] April 21, 1933.

Hon. Frank E. Wood. Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1931 filed during the period from December 7, 1932 to April 18, 1933 which together with our

previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931 filed during the period from January 1, 1932 to April 18, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1931 from January 1, 1932 to April 18, 1933 classified by amount of tax paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability for the Year 1931 together with the number of merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of taxpayers classified as to amount of tax paid by each taxpayer.

The information contained in this report was compiled from the duplicate copies of receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 454.)

[fol. 454]

Analysis of Kentucky Gross Retail Sales Tax Returns

Number of Reports Filed by Retail Merchants—

Showing Retail Sales less than $400,000.....
Showing Retail Sales between 400,000 and 500,000.....
Showing Retail Sales between 500,000 and 600,000.....
Showing Retail Sales between 600,000 and 700,000.....
Showing Retail Sales between 700,000 and 800,000.....
Showing Retail Sales between 800,000 and 900,000.....
Showing Retail Sales between 900,000 and 1,000,000.....
Showing Retail Sales in excess of 1,000,000.....

Totals.....

Analysis of Reports Showing Tax Liability—

Showing Sales less than $400,000.....
Showing Sales between 400,000 and 500,000.....
Showing Sales between 500,000 and 600,000.....
Showing Sales between 600,000 and 700,000.....
Showing Sales between 700,000 and 800,000.....
Showing Sales between 800,000 and 900,000.....
Showing Sales between 900,000 and 1,000,000.....
Showing Sales in excess of 1,000,000.....

Totals.....

Number of Merchants Reporting Sales of—

Less than $10,000.00.....
$10,000 and under $25,000.....
25,000 and under 50,000.....
50,000 and under 75,000.....
75,000 and under 100,000.....
100,000 and under 150,000.....
150,000 and under 200,000.....
200,000 and under 250,000.....
250,000 and under 300,000.....
300,000 and under 400,000.....
Over $400,000.....

Totals.....

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931, Filed During the Period from January 1, 1932 to April 18, 1933

of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
wing Retail Sales less than $400,000	20,351	12,173	8,178
wing Retail Sales between 400,000 and 500,000	10	6	4
wing Retail Sales between 500,000 and 600,000	9	6	3
wing Retail Sales between 600,000 and 700,000	3	3	0
wing Retail Sales between 700,000 and 800,000	2	1	1
wing Retail Sales between 800,000 and 900,000	3	2	1
wing Retail Sales between 900,000 and 1,000,000	2	2	0
wing Retail Sales in excess of 1,000,000	2	2	0
Totals	20,382	12,195	8,187

of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
wing Sales less than $400,000	20,351	290,824,180.00	145,489.13	78,719.31	66,769.82	179,339.94
wing Sales between 400,000 and 500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
wing Sales between 500,000 and 600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
wing Sales between 600,000 and 700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
wing Sales between 700,000 and 800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
wing Sales between 800,000 and 900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
wing Sales between 900,000 and 1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
wing Sales in excess of 1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,382	310,467,073.00	176,795.86	91,658.87	85,136.99	191,645.14

of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
s than $10,000.00	8,531	4,942
0,000 and under $25,000	1,818	2,160
5,000 and under 50,000	1,006	759
0,000 and under 75,000	388	145
5,000 and under 100,000	175	45
0,000 and under 150,000	128	68
0,000 and under 200,000	63	27
0,000 and under 250,000	24	12
0,000 and under 300,000	19	11
0,000 and under 400,000	21	9
r $400,000	22	9
Totals	12,195	8,187

[fol. 455] SCHEDULE "B"

Statement Showing Number of Retai Merchants Reporting Gross Sales Taxes for the Year 1931 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1932 to April 18, 1933

Number of Taxpayers Reporting Tax					less than	50¢			2,220
"	"	"	"	"	50¢	to	1.00		1,838
"	"	"	"	"	1.00	"	2.00		2,323
"	"	"	"	"	2.00	"	3.00		1,239
"	"	"	"	"	3.00	"	4.00		733
"	"	"	"	"	4.00	"	5.00		585
"	"	"	"	"	5.00	"	10.00		1,490
"	"	"	"	"	10.00	"	15.00		642
"	"	"	"	"	15.00	"	20.00		339
"	"	"	"	"	20.00	"	25.00		212
"	"	"	"	"	25.00	"	50.00		400
"	"	"	"	"	50.00	"	100.00		126
"	"	"	"	"	100.00	"	200.00		31
"	"	"	"	"	200.00	"	300.00		7
"	"	"	"	"	300.00	"	400.00		2
"	"	"	"	"	400.00	"	500.00		1
"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	800.00	"	900.00		1
"	"	"	"	"	900.00	"	1,000.00		2
Over $1,000.00									4
Total									12,195

[fol. 456] EXHIBIT BRENDEL #3

[fol. 457] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932

Filed During the Period from January 1, 1933, to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 458] April 21, 1933.

Mr. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

In accordance with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1932 filed during the period from January 1, 1933 to April 17, 1933 and we submit herewith the following statements showing the results of this compilation:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932 filed during the period from January 1, 1933 to April 17, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1932—classified by amounts of tax paid—filed during the period from January 1, 1933 to April 17, 1933.

Schedule "A" shows in detail the Gross Sales, Gross Tax Credits Allowed and Credits Claimed in excess of Tax Liability for the year 1932 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales up to and over $400,000.

Schedule "B" is a statement showing the number of Taxpayers classified as to the amount of tax paid.

The information contained in this report was compiled from the duplicate copies of the receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are true and correct to the best of our knowledge and belief.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 459.)

[fol. 459]

Analysis of Kentucky Gross Retail Sales Tax Returns for th

	Numb file
Number of Reports Filed by Retail Merchants—	
Showing Retail Sales less than $400,000	14,5
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales berween 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	14,5

	Numb retur
Analysis of Reports Showing Tax Liability—	
Showing Sales less than $400,000	14,5
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 znd 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	14,5

	Show tax liabil
Number of Merchants Reporting Sales of—	
Less than 10,000	5,9
$10,000 and under $25,000	1,1
25,000 and under 50,000	6
50,000 and under 75,000	1
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over 400,000	
Totals	8,07

[fol. 459]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932, Filed During the Period from January 1, 1933, to April 17, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	14,582	8,068	6,514
Showing Retail Sales between 400,000 and 500,000	4	2	2
Showing Retail Sales berween 500,000 and 600,000	5	5	.....
Showing Retail Sales between 600,000 and 700,000	1	.....	1
Showing Retail Sales between 700,000 and 800,000	2	1	1
Showing Retail Sales between 800,000 and 900,000	1	1	.....
Showing Retail Sales between 900,000 and 1,000,000	1	.....	1
Showing Retail Sales in excess of 1,000,000	1	1	.....
Totals	14,597	8,078	6,519

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing Sales less than $400,000	14,582	176,783,514.26	88,522.10	52,573.72	35,948.38	152,954.91
Showing Sales between 400,000 and 500,000	4	1,835,261.79	1,035.27	752.99	282.28	6,163.47
Showing Sales between 500,000 znd 600,000	5	2,764,557.75	2,071.04	963.54	1,107.50	.....
Showing Sales between 600,000 and 700,000	1	601,558.29	556.23	556.23	.....	35.73
Showing Sales between 700,000 and 800,000	2	1,522,598.66	2,574.30	1,277.24	1,297.06	908.68
Showing Sales between 800,000 and 900,000	1	864,205.61	1,949.44	415.00	1,534.44	.....
Showing Sales between 900,000 and 1,000,000	1	939,417.13	2,535.04	2,535.04	.....	117.45
Showing Sales in excess of 1,000,000	1	1,001,903.32	3,169.03	422.00	2,747.03	.....
Totals	14,597	186,313,016.81	102,412.45	59,495.76	42,916.69	160,180.24

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than 10,000	5,903	4,157
$10,000 and under $25,000	1,185	1,688
25,000 and under 50,000	636	446
50,000 and under 75,000	181	96
75,000 and under 100,000	58	46
100,000 and under 150,000	50	38
150,000 and under 200,000	25	18
200,000 and under 250,000	11	9
250,000 and under 300,000	13	6
300,000 and under 400,000	6	10
Over 400,000	10	5
Totals	8,078	6,519

[fol. 460] SCHEDULE "B"

Statement Showing Number of Retai Merchants Reporting Gross Sales Taxes for the Year 1932 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1933 to April 17, 1933

Number of Taxpayers Reporting Tax less than 50¢										1,667
"	"	"	"	"	of	50¢	to	1.00		1,247
"	"	"	"	"	"	1.00	"	2.00		1,569
"	"	"	"	"	"	2.00	"	3.00		813
"	"	"	"	"	"	3.00	"	4.00		494
"	"	"	"	"	"	4.00	"	5.00		369
"	"	"	"	"	"	5.00	"	10.00		1,000
"	"	"	"	"	"	10.00	"	15.00		381
"	"	"	"	"	"	15.00	"	20.00		195
"	"	"	"	"	"	20.00	"	25.00		114
"	"	"	"	"	"	25.00	"	50.00		164
"	"	"	"	"	"	50.00	"	100.00		50
"	"	"	"	"	"	100.00	"	200.00		9
"	"	"	"	"	"	200.00	"	300.00		2
"	"	"	"	"	"	300.00	"	400.00		1
"	"	"	"	"	"	400.00	"	500.00		0
"	"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	"	800.00	"	900.00		0
"	"	"	"	"	"	900.00	"	1,000.00		0
"	"	"	"	"	over	1,000.00				3
Total										8,078

[fol. 461] Albert H. Morrill

ALBERT H. MORRILL, called for the plaintiff, testified as follows:

He resided in Cincinnati, Ohio and his business address was 35 E. Seventh Street, Cincinnati, Ohio. He was an attorney at law but had not been practicing since April 1, 1930. Since that time he had been President of The Kroger [fol. 462] Grocery & Baking Company and of the Piggly Wiggly Corporation. Prior to the time he became President he was counsel for The Kroger Grocery & Baking Company for approximately 15 years, and as such he was in close touch with their business affairs. He had charge of the acquisition of various stores during the period 1927, 1928 and 1929. He was also familiar with the business of the Piggly Wiggly Corporation and had been familiar with it since 1928. At that time he supervised the acquisition of the stock of the Piggly Wiggly Corporation by The Kroger Grocery and Baking Company.

The Kroger Grocery & Baking Company was engaged in the distribution of food at retail. Piggly Wiggly Corporation owns patents, trade names, copyrights, all of which are

leased out to operators in various parts of the United States, Kroger being next to the largest operator under these licenses and paying a license fee the same as any other operator. The organizations are entirely separate. All of the Piggly Wiggly licensees are engaged in the grocery business, being retail distributors. They operate all over the United States with the exception of some territories. They also operate in some foreign countries, including Australia, Hawaii, Alaska and Canada.

Mr. Morrill's association with the operations of the Piggly Wiggly Corporation bring him into touch with economic conditions pertaining to the food industry and with competitive conditions thereon throughout the United States.

The Kroger Grocery & Baking Company engages in business in seventeen states in the middle west, beginning in the northwest with Wisconsin and running substantially south taking in Oklahoma, then east through Mississippi, Tennessee, southwestern Virginia and western part of Pennsylvania and along the northern boundary of the United States, east from Wisconsin. In addition to being connected with The Kroger Grocery & Baking Company and [fol. 463] the Piggly Wiggly Corporation he had been associated from about 1915 on with The Colter Company, a wholesale concern which ran a chain of 350 stores, having served as a Director of that company. In connection with that business, he had become familiar with the organization and operation of so-called cooperative or voluntary grocery chains. He had organized and drafted the cooperative contracts with what is known as Associated Community Stores. For two and one-half years he filled positions in the National Chain Store Association and for a while he acted as President. During his term of President he became familiar with the economics and general operation of large-scale business enterprises which he studied. At that time he spoke at various institutions, before places of learning, legislature and trade associations. He has also had close contact with the General Stores Association in Germany, France, Austria and England and he had attended some of their meetings and had negotiated the sale of Piggly Wiggly rights to the largest chain in England. He had visited foreign countries and talked to operators and studied their bookkeeping, delivery, warehousing methods and every-

thing connected with the business. At the time of his testimony he was Vice President of the National Chain Store Association.

He has had constant contact with legislation effecting business in the United States on behalf of the Kroger Company and other companies. He was qualified to testify as an expert in cases involving taxes on retail merchants in Hamtramck, Michigan, and Maplewood, Missouri. He has appeared before a great number of legislative committees and has lectured on merchandising subjects at the Northwestern University, the University of Virginia and the Washington and Lee University, at Lexington, Vir-
[fol. 464] ginia. He thought he has sufficient experience and qualification to testify as an expert concerning economics and operations, and management and the relation thereto in the food industry generally in the United States.

He stated that the primary purpose of The Kroger Grocery & Baking Company is to distribute food through retail stores throughout the middle west. Its objective is to cut down the cost of distribution and for the purpose of securing this result it seeks to get as close to the producer, the farmer and other producers as it can and it also seeks to bring their food products through a rapid movement and fast turnover and as small a mark-up as possible to the customers who come into the stores. For the purpose of securing this result, it operates dairies, farms, packing houses, bakers' shops, coffee plants, creameries and butter factories. The prime object is to secure food stuffs from a source which is as close to the producer as possible and bring it to the consumer with only one mark-up. The Kroger Company and all similar businesses are built on an extremely small margin of profit, the percentage varying from a red figure to 2.50% or 3.8%, the higher figure being the exception.

The average percentage of net profit in the United States during the three years that the tax had been in effect in Kentucky, namely, 1930, 1931 and 1932 was 1%. Since a company of the character of the Kroger Company only secures a small profit, it must have a large volume of sales in order to exist. In addition to grocery stores working on this method, there are also such organizations as mail order houses with separate retail stores such as Sears-Roebuck & Company and Montgomery Ward & Company.

In the moderate price department store field there are Penney and Grant. The drug field is represented by Walgreen, Dows and many others. The Melville Shoe Company is an example of such an organization which sells shoes. Retail sales of the Kroger Company in Kentucky [fol. 465] have been as follows:

1931	$14,653,448.00
1931	13,496,915.00
1932	11,447,611.00

The profits in the company made on its Kentucky business in the State of Kentucky during the three years, without regard to Kentucky Gross Sales Tax but after all other taxes, was as follows:

1930	$172,892.93
1931	151,734.19
1932	86,230.98

The Kentucky Gross Sales Tax for the three years, without consideration of credits, amounted to—

1930	$139,584.48
1931	128,019.15
1932	107,526.12

The credits due Kroger on account of license taxes paid were:

1930	$15,369.00
1931	15,643.84
1932	12,271.75

When the credits are considered the Kroger tax under the Kentucky Gross Sales Tax was as follows:

1930	$124,215.48
1931	112,377.31
1932	95,254.37

The net profit in Kentucky after deducting the Kentucky Sales Tax was as follows:

1930	$48,677.45
1931	39,358.88
1932	9,023.39

In other words, in 1932 the application of the Kentucky Sales Tax would turn a net profit of over $80,000.00 into a loss in excess of $9,000.00. It took all of the profits and absorbed part of the capital.

The percentage of net profits before and after the tax was as follows:

[fol. 466]

	per cent of net profit before tax.	Per cent of net profit after tax.
1930	1.18%	.33%
1931	1.13%	.29%
1932	.75%	Loss .078%

The defendants objected to the introduction of the above evidence.

The company does not operate any stores except food stores, in which is included groceries, meats, some delicatessen items, produce and green groceries. It sells butter, eggs, milk, cream, cheese of all sorts, vegetables, pork, lamb, beef, canned goods, everything that comes off of a farm and goes on to the table for food. It also distributes seed and in some sections of the country fertilizer.

Kroger operated 289 stores in Kentucky in 1930, 254 in 1931 and 249 in 1932. Profits per store before and after the tax were as follows:

	Profits per store before tax.	Profits per store after tax.
1930	$598.00	$168.00
1931	598.00	155.00
1932	347.00	Loss 36.00

The tax per store under the Kentucky Act was as follows:

1930	$429.00
1931	442.00
1932	382.00

When special license taxes which must be paid are added then the tax per store was $483.00 for 1930, $504 for 1931 and $432.00 for 1932. In addition to that the Kroger Company paid taxes on its physical property in the State of Kentucky the same as all other property owners. Kroger owned land, buildings, machinery, equipment, leaseholds and inventories, which at the close of 1932 amounted to

$1,211,876.17. It owned a large plant at Louisville, Kentucky. It leased its stores for the most part at higher rentals then they would cost if the property was purchased. The stores were always located in what was considered desirable locations.

[fol. 467] Kroger rentals as a rule are based on the taxes paid by the landlord.

The Kroger Company paid direct to the Federal Government on the Kentucky business, that is, allocating such part of it as was proper, $20,291.51 in 1931 and it collected and turned over to the Federal Government in the way of taxes on various things like oleomargarine and cigarettes $204,701.38.

Witness stated that to the best of his recollection taxes represented approximately 25% of the rent. At the end of 1932 rental commitments such as leases amounted to $332,297.52, many of them being on long leases, two and three years, and some as much as five years.

Outside of the gross sales tax the company paid the State of Kentucky in 1932 $169,971.59. In addition to that the company is subjected to taxes on store operations by various municipalities.

The company operated 5302 stores in 1930; 4980 stores in 1931 and 4816 stores in 1932. Profits and sales of the company during those three years were as follows:

	Sales.	Profits.
1930	$267,094,345.26	$1,475,671.06
1931	244,371,147.17	2,199,444.46
1932	213,159,742.69	2,441,089.41

The profit represents what was made from the operation of the grocery business, exclusive of any income from investments. The percent of net profit to sales was .55% in 1930, 90% in 1931 and 1.15% in 1932.

If the same sales tax in effect in the State of Kentucky had applied to Kroger's business in each of the states in which Kroger operates then Kroger would have lost $767,000 in 1930, made $171,000 in 1931 and $650,548 in 1932. The Kroger tax runs pretty close to 1% and unless a profit of 1% is made on sales then the Kentucky tax causes a loss. The percent of tax to sales in Kentucky would have been .84 of 1% in 1930, .83 of 1% in 1931 and .84 of 1% in 1932. The tax would not be passed on to the consuming pub-

[fol. 468] lic because it does not apply to everybody. It is

not the usual sales tax which has been adopted in Indiana, Mississippi and Illinois. It exempts practically everybody in the State of Kentucky, leaving only the larger concerns subject to the tax. Competition in the food industry being very keen has a great effect on the price. A concern operating on less than 2% net profit cannot keep its volume of sales up when it raises its price. Once the prices are raised the people do not shop at the store but go to competitors. Kroger could not compete with small chains like those that exist in Louisville when it has to pay a tax of the size which is imposed on it and is not imposed on other people. It would be impossible to pass on a 1% tax to the consuming public when that tax applied only to a few concerns. As a result the tax would fall directly on the corporation and would come out of capital. It actually did come out of capital in 1932.

In 1930 the tax would have caused a net loss close to One Million Dollars if it had been effective throughout the United States. A net loss of such an amount would prevent the operation of the company any longer than three years. Possibly it might exist five years. The reason for this is that the business is operated on a cash basis. Sales are made for cash and payments are made in cash. The company needs many millions of dollars to do business on. The company statement as of December 31, 1932, shows $12,000,000 in cash. If it should get below seven or eight million dollars the company would not have enough money to do business on. With a loss of one million dollars a year the company would be put out of business, from a practical standpoint, in five years. Of course, the company could not get any new money if it showed losses. No bank would lend the company money and no one would buy the securities.

[fol. 469] The rate of profit at which the company earned in 1930 and 1931 was somewhat lower than the rate of profit earned by the average grocery store chain. The rate of profit for 1932 was somewhat higher than that earned by the average grocery chain. This is based not on all the chains in the United States but from a knowledge of two or three chains that have better sales than Kroger. A majority of the stores are operated at a loss of 1%. The difference insofar as profits were concerned was not due to territory but to management. That is the entire thing in a grocery business.

The defendant objected to the introduction of the above testimony.

The chief characteristic of the economic period of American business covered by the years 1927, 1928 and 1929 was an enormous inflation of prices and expenditures. There was a public psychology which made anybody willing to buy anything irrespective of the price. In the opinion of the witness those years are not a great criterion of the profits and earnings which can normally be made in the conduct of retail merchandising, whether in the food or other retail merchandising field. The crash in these values occurred in September, 1929. This was the first one. Another one occurred in October, 1929, and a third during the next summer. Values varied thereafter causing disorganization and chaos in business generally. With a comparatively few exceptions business profits disappeared in retail business after the crash in the fall of 1929. Many of the larger companies got into the red and went into the hands of receivers. A large number of the smaller grocery chains also went into receivership and their assets melted away. Almar Stores in Pennsylvania is an example of a large grocery chain which failed and went into the hands of a receiver since 1929. The Saunders System of Louisville, Memphis and Nashville also went into the hands of a Receiver and was sold through the United States Court in the latter part of 1930 and 1931. Some smaller ones, the names of which he could not recall failed since 1929. In other types of retail merchandising Liggets, The United [fol. 470] Cigar Stores, Bellas-Hess, Grant-Silver and McCrory Stores are examples of chain store organizations which were placed in Receivership.

The Kentucky Gross Sales Tax has no relationship to what is commonly known as a sales tax. The socalled sales tax levies a tax on sales at a flat rate. In some of the states the law provides that no person selling merchandise or an article that is taxed shall advertise or say he is paying the tax. The purpose of that tax is to put it on the consumer, leaving the operations of business as little disturbed as possible. In contra distinction to that the Kentucky Sales Tax in its operations admittedly exempts all sales made provided they do not run over a certain amount. It graduates very rapidly so as to put concerns doing a large business in a hopeless competitive position with the twenty or

thirty thousand other people who are aggregating a larger volume of business but who individually do a smaller volume of business.

The witness testified that from his experience he would say that profits tend to decrease with increased sales. However, there are many exceptions to this rule. The increased sales has no necessary relation to net profits. A striking example of that was that of Clarence Saunders, who controlled stores in two or three cities and made a nice profit on his sales. As his volume of sales increased, however, his profits decreased and he was out of business in the course of a year or so. Under exceptionally skillful management the relationship between a large volume of sales and return on invested capital maintains itself and sometimes increases. But what actually happens, the so-called law of diminishing returns begins to work and when sales increase to a million or more one does not secure the same proportionate amount of profits. Actually, you have a smaller proportion of profits than under less sales.

[fol. 471] Sales are not a measure of the amount invested in business. There is no relationship between the two. The amount invested in business may be in dead assets or in poorly located stores and unless by proper management, proper location or proper use of capital it is turned into life it means nothing. It comes back again to the question of management and this is peculiarly so in the retail distribution of food stuffs through stores.

The witness had had twenty odd years of experience in retail merchandising business and from his observation he thought that prior to 1929 success was due in large measure to luck. Since that time economic success depended 90% on personnel of the organization. This referred not so much to the top of the organization as to the organization below.

Average sales per store for 1930 were $50,376.00; 1931, $49,070.00; and 1932, $44,260.00. Sales per store per week in the country as a whole average $956.50 for 1930; $943.56 for 1931 and $851.17 for 1932.

Excluding the return from investments, net profit of the company as a whole on a per store basis in 1930 was $278.32; 1931, $441.66, and 1932, $506.87. The invested capital and the return earned by Kroger on its invested capital for the three years was as follows:

	Invested capital	Return earned on invested capital
1930	$50,932,462.32	4.26%
1931	51,521,172.84	5.30%
1932	46,084,825.70	5.95%

The Kroger Company had 1,813,486 and six-twentieths of a share outstanding in 1930 and 1931. In 1932 it had 1,811,091 and six-twentieths of a share. In both 1931 and 1932 the company paid $1.00 dividend on outstanding stock. In 1930 it paid $1.00 per share, plus a part of a stock dividend of 5%. The stock is owned by approximately 20,000 shareholders, 78% of whom are located in the middle west. There are a number of stockholders in Kentucky. The [fol. 472] stock is widely scattered. Only two stockholders have any quantity of stock and three of the largest stockholders together have less than 1%. Approximately six or seven thousand shareholders own less than 100 or 200 shares. 40% of the stockholders own less than 100 shares each. A large percentage of the stockholders are women. The same is true with regard to charitable institutions.

In the event the gross sales tax act continues to absorb all profits the company could withdraw from the state but to do so would mean a total loss on all investments in Kentucky and on all rentals. It would also result in a severe loss on automotive equipment which is especially designed to meet the Kentucky laws. All monies expended in improvement on leaseholds and fixtures would be lost. There might be a salvage with regard to fixtures in the amount of 25%. The good will of the company in the state would be entirely lost. Kroger has been one of the largest users of newspaper space in Kentucky since 1927. A large amount of money has been expended in this way building up good will. Money has also been contributed to the various Chambers of Commerce for the same purpose. A fine personnel drawn almost without exception from Kentuckians has also added to the good will. The working organization which is receiving salaries from the company could not be used elsewhere in the event the company withdrew from Kentucky. A large amount of money is expended in building such an organization. Kroger trains its men, having regular training schools and diplomas. There the men learn the business. Kroger also maintains in Cincinnati the so-called Kroger-Food Foundation which

checks all of the Kroger purchases in a scientific practical way and does a great deal of consumers research work.

Kroger, a short time prior to the time of the testimony was given, gave a food show in Louisville, which cost it some Ten Thousand Dollars. The show was attended by tens of thousands of people. This has all resulted in the [fol. 473] building up of a good will for assisting the customers and removal from Kentucky would involve a loss on this intangible property as well as other.

Kroger had 865 employeees at the end of 1932. This was slightly more than they had in 1929. In 1932 Kroger paid $1,203,000, in wages in Kentucky. It purchased a large amount of food supplies and other products in Kentucky. Annual expenditures in Kentucky for products of that State's soil is a little less than Five Million Dollars. There is little difference between the store of The Kroger Grocery & Baking Company and the stores of its competitors who are engaged in the same kind of business. There is no difference between the grocery store conducted by members of the Independent Grocers Association, or I. G. A., and a grocery store conducted by The Kroker Grocery & Baking Company, or The Great Atlantic & Pacific Tea Company. The only exception is that in one case there is individual ownership by a member of the association and a corporate owner in the acse of the Kroger Company. In both cases there is one organization buying for all of the stores. In both cases they have a uniform store layout and joint advertising for the benefit of all of the stores. Deliveries are made to stores in both organizations by the same trucks of a standardized order. Both have a uniform system of accounting in the stores and contribute a part of their earnings to a common fund. The only difference is ownership.

I. G. A. is a voluntary chain which claims to have eighteen thousand member stores in the United States. They have a mass purchasing and a mass selling and advertising ability which is in excess of Kroger. In addition to the I. G. A. there are a number of other voluntary cooperative sales organizations, all of which are organized along the same lines. Today there is no difference between the Kroger stores and that of a neighborhood grocery affiliated with a voluntary chain store association. Members of voluntary chain associations purchase from wholesale grocers and also directly from the manufacturer. They sometimes pur-

[fol. 474] chase their meats through an intermediary but often they purchase it from Swift and Armour much in the same manner as Kroger does. Their purchases are once or twice or three times removed from the producer but Kroger takes it directly from the producer. Sometimes it is once removed from the producer.

The Kroger stores require no more police regulation than any other similar business and probably less. The company carries its own insurance and is very strict about fire hazards. It requires constant supervision. There is a supervisor for every twenty stores. It is his business to see that the stores are clean, that there is no inflam-able material in the cellar. The goods in the Kroger stores is similar to that in other stores insofar as fire hazards and police supervision is concerned. Kroger conforms in every case to every known regulation of the municipal authorities. One of its chief endeavors is to have a clean store. The food sold is fresh and in its urban sections it has daily deliveries. As a result it delivers perishables almost every day. With few exceptions it has mechanical refrigeration. The turn over is rapid. In the country Kroger never keeps a supply for more than thirty days and only keeps a week's supply of perishables. Everything the company buys is tested in the Kroger Food Foundation. A great deal of the products submitted are turned down. The Company is forced to conform to the law of supply and demand insofar as the prices which it pays for merchandise is concerned.

In the opinion of the witness, as a result of his years of experience, it is impossible for a grocery merchant to remain in business and earn a fair return on his investment and pay tax of $400.00 to $50.00 per store in addition to what his competitors pay. There is no difference between the business of the Kroger Company and that of its competitors. It does not require a different personnel.

[fol. 475] Cross-examination:

The witness has been President of The Kroger Grocery and Baking Comp-ny since April 1, 1930. At that time there was a complete change in the personnel of the officers, only one of officers remaining of those who held office prior to April 1, 1930.

Mr. William H. Albers, who served in the capacity of President and General Manager prior to April 1, 1930, was no longer connected with the Kroger Company. There were one or two other executives of the company who had been directors who left the company at the same time. The change in the directorship was due to the discovery of earning figures of 1928 and 1929 that were not correct.

The company was not refinanced nor was there any new money introduced at that time. Mr. Bernard H. Kroger, the original founder of the company was not connected with it at the time the witness's testimony was taken, he having retired during 1927 or the early part of 1928.

At the time Mr. Morrill took charge there was a change in the method of conducting the business.

The books of the company are kept by bookkeepers and accountants and are audited and supervised by a certified public accountant. The audit is continuous and a general audit is made each year by Lybrand Ross Bros. and Montgomery. The only records kept at each individual store are the sales sheets, inventory sheets, expense sheets, cash, miscellaneous expense, such as light and power and various other things that enter into the operation of the particular store. The records at the individual stores do not show all the expenses incurred in operating that store. They do not show hauling, warehousing and a number of other things. Bookkeeping at each store is reduced to a minimum. The books show the amount of sales at each store. [fol. 476] Bookkeeping methods are uniform throughout all the stores. Books kept at branch headquarters show the operation of the particular branch including profit and loss. One of the branches is located in Kentucky, but five of them do business in that state. Above the branch is the general office. Complete records are kept there. These records show the operations of the company as a whole and are made up from reports of the branches. The general office is at Cincinnati, Ohio.

Commencing with the middle of 1930, a system of operating was developed, but prior to that time there was no such system and for this reason there are no books showing profit and loss prior to that time. However, there are records since 1930 showing result of operation. It is im-

possible, with any degree of accuracy, to determine the results of operation preceding 1930. The present operating system shows sales, expenses and taxes, wages paid, cash discounts obtained, depreciation, net profit, etc. The records show daily, as well as weekly reports. The Kroger Grocery & Baking Company does not keep records for each month's operation. They divide every four weeks into a different period and this is combined at the end of the year for the report which is prepared by Lybrand Ross Bros. and Montgomery. Kroger operates thirteen 4-week periods in each year rather than on the actual calendar year.

At the close of 1932, Kroger operated 4816 stores. Of that number 289 were in Kentucky. Profits in Kentucky are derived by taking the profits of the different stores and combining them and taking the cost of the merchandise, the figures on gross profits and deducting expenses. The records used in reaching this result are located at Charleston, W. Va., Louisville, Ky., Carbondale, Tenn., and Cincinnati, Ohio, these being branches of the Kroger Company, and it is possible from these reports to determine the profits [fol. 477] made in Kentucky during the years 1930, 1931 and 1932. The net profit is derived by taking the sales at the various stores, the store gain, and, after combining those and adding to them the profit on manufacturing operations in Kentucky and deducting the expenses necessary and incident to the running of the stores in Kentucky. The resulting figure is the net profit. (In getting up these figures, reliance was made solely upon profit and loss from the retail business, all operations of Kentucky being included.) However, operations other than store operations are not very great. These operations include, among other things, a bakery. No part of the overhead for the central office was charged to Kentucky in getting up the figures.

Profits are determined by the store gain which represents the difference between the cost of merchandise and the various expenses in the store.

Witness stated that no separate records had been kept of the Kentucky stores for the past three years. The witness was unable to give the inventory of the Kentucky stores as of the beginning of the year 1930; that he had no information available on the cost or purchase price of the goods in the Kentucky stores; that he did not think

records were available to show these facts. He stated that he had no records to show the salaries paid in Kentucky stores during the year 1930, and that he had no records of the amount expended for rent in Kentucky for the same year. He thought the records could be collected in Cincinnati.

The witness did not personally make the examination of the record but relied upon reports of others who were employes and executives. The figures given were the result of compilation made especially for the particular law suit. [fol. 478] (Testimony, page 70.) When witness' statements of earnings were given concerning Kentucky stores, he did not draw his conclusions from the details of operations of those stores which had resulted from considering the cost of goods, salaries, earnings and every other such item of expense incurred in Kentucky. He did not arrive at his conclusion in this manner because this method would have "occupied too much time," and "one person could not have gotten this information altogether." Witness had gathered his information on these subjects from numerous sources at the branches where the records were located, from the auditing and treasury departments, he himself not having made an examination of the sources of such information, but he relied on the reports of others.

The average profits for Kentucky, before the Kentucky tax, per store for 1930 was $598.00. This was higher than the average in the United States. In the United States the average net profit per store for 1931 was $441.56, and in Kentucky, before the Kentucky tax, it was $498.00; in 1932 the average net profit was $506.87 including investments, and in Kentucky, without the tax, it was $347.00. Witness was not able to explain the reason for the fact that the average profit of the Kentucky stores in 1932 was less than the average in the United States, but he was of the opinion that the burden of the tax caused the net sales to drop off. Various branches were losing heavily in 1929 and 1930 and they improved during 1932, but the improvement was better in other branches than Kentucky. (Testimony, p. 74.) Witness cannot explain the fact that his average profits in 1932 were considerably less than the average for the whole U. S. Conditions there were worse than the United States as a whole but they were no worse than Michigan or Northern Ohio or Western Pennsylvania

and other industrial centers. Insofar as Kentucky was [fol. 479] concerned, tobacco was very low and the people in that business in Kentucky did not have any money to spend.

In referring to profits from investments, witness meant profits from stocks, such as Piggly-Wiggly Corporation. The annual report for 1932 shows net earnings of subsidiary companies, including a dividend of $299,778.03, which represents the income from investments. Nothing is credited for good will. The expense of the cooking school held in the City of Louisville, which amounted to $10,000. was charged to the general office with the exception of about 2% which was charged to the Louisville branch. None of the general office expenses are allocated to Kentucky.

The largest merchandising food firm is the Great Atlantic and Pacific Tea Company. This is one of the chief competitors of Kroger. It is not true that Kroger opens a store in the same neighborhood as the A. & P. every time that concern establishes a store. There are many instances where Kroger stores are located near A. & P. Stores but the Kroger Company does not establish stores near A. & P. stores unless business justifies it. The Great Atlantic and Pacific Tea Company operates all over the United States except in the far west. They do operate, however, in California. The First National Stores do not operate in Kentucky and the American Stores operate chiefly in Pennsylvania, Delaware, New Jersey and New York, but do not operate in Kentucky. The National Tea Company which operates in Illinois, Iowa, Wisconsin and Minnesota does not operate in Kentucky. Safeway Stores which operate in Kansas City does not do business in Kentucky. Those named are the chief grocery chains. None of those named have ever failed. Pender, operating in Virginia and the Carolinas does not operate in Kentucky. They are in the hands of banks and creditors. Southern Stores operate in Florida and adjoining states, but not in Kentucky, and they are also in the hands of creditors. All of the concerns mentioned are grocery food chains. Loblaw operating in New York and Canada, but not in Kentucky, is [fol. 480] doing all right. None of the larger firms mentioned have failed or gone into the hands of receivers, for the most part the failures having been among the smaller

chains in the grocery line. (Testimony, page 80). "Outside of Saunders I don't know of any failure since 1930."

The Atlantic and Pacific and Kroger are the only two of the large chains affected by the Kentucky law. There have been a larger number of failures among smaller individuals. According to figures shown by the Louisville Grocery Survey, the mortality rate among individual groceries was 100% every three and one-half years. Since the advent of chains in 1920, the mortality rate has not been quite as great and it has been progressively decreasing. The Louisville Grocery Survey shows that the chains actually help out the individual grocer since he learns from the chain and fixes up his store and gets better merchandising, better displays, better salesmanship and better personnel. As a result the independent grocer was not suffering the same mortality rate up to 1930 as he had in the years prior to 1919.

The witness calculated the book value of the capital stock at approximately $46,000,000.00. (Testimony, p. 81.) Witness stated that he could not give the book value of Kroger common stock, but it was between $22.00 and $22.50 per share; that some adjustments had been made last year (1932) and that they had written off a "lot of obsolete stuff." The total net earnings for the year 1930, including investments, was $2,168,247.48. In arriving at the income produced in Kentucky, the exact gross income per store was taken and in making deductions there was an allocation of such items as could not be assigned to a specific store. Advertising expense, interest charges, branch expenses, such as supervision, warehousing, hauling and administration for stores in and out of Kentucky were allocated proportionately according to the number of stores based on sales. The same was true of branch legal expense, office supplies, printing, stationery, telephone, telegraph and postage. Depreciation is charged from month to month and carried into operations as an expense charge against net income. On buildings the rate runs about fifty years and on retail store equipment the depreciation varies from a year to the period of the lease. Fixtures in the [fol. 481] store of a more or less permanent nature, such as mechanical refrigeration, shelving, etc. are written off during the term of the lease if possible.

The profits of the company for the first six months of 1933 were $2,294,794.27. The sales for that period were

$91,997,867.55. The percent of profit to the sales was 2.49. The Kroger Company business was much more profitable for the first six months of 1933 than it was for the similar period in 1932, the increase in profits being $929,749.17.

There has been an improvement in net earnings since April, 1930, the time when the witness took charge as President.

The Kroger Company took over the Piggly Wiggly Corporation in Kentucky in 1928. The company has been eliminating stores ever since the witness took charge. In the last three or four years Kroger has been consolidating its possessions in Kentucky in an attempt to improve its operations there. Kentucky is logically Kroger territory. There is no opportunity for expansion there, the necessity being for contraction. Kentucky is rather overbuilt insofar as grocery retail outlets are concerned. This is shown by the Louisville Grocery Survey. Kroger Company established stores in Kentucky in 1897. There was a gradual increase up to 1927, at which time stores belonging to other chains were purchased. These stores were located in Paducah and Louisville. They augmented the number of stores operated by Kroger by several hundred. At that time Kroger had some stores in Louisville, Newport, Covington and Lexington. Since that time Kroger has been attempting to cut out competition between its own stores. Witness estimated that the increased expense of operation due to the National Industrial Recovery Act would take all of the profits earned in the first half of 1933. He expected that there would be some adjustment in prices to meet this increased cost.

[fol. 482] Harry W. Schacter

Harry W. Schacter, called for the plaintiff, testified as follows:

He lives at 1200 Castlewood Ave., Louisville, Kentucky. He is President of The Kaufman-Straus Company of Louisville. This is a department store dealing in all kinds of goods, located on Fourth Street between Walnut and Liberty. It occupies a five store building. Its annual sales exceed one million dollars. The business is fifty-four years old and it is one of the largest and oldest department stores in Louisville.

From September, 1925, to April, 1927, the witness was connected with the American Retailers Association of New York at the central office of the organization. This was a group of 17 department stores located all over the United States, having annual sales of approximately one hundred twenty-five million dollars. Some of the stores in this group were Bloomingsale in New York, Lansburgh in Washington, Gilchrist in Boston, Wieboldt in Chicago, Boston Store of Milwaukee, and others.

In April, 1927, the witness became assistant to the general manager of Herman Straus & Sons Company of Louisville. In April, 1929 he was made general manager, holding this position until March 1, 1932, at which time he became President of Kaufman-Straus Company.

Witness has made a study of retailing ever since he went with the American Retailers Association. One of the main functions at the central office in New York was intensive research into the theory and practice of retailing. Witness has written approximately fifty articles that have been published in various magazines dealing with retailing questions. Most of these articles were published in magazines called "Retailing," "Women's Wear," and "Dry Goods Economist." His most recent article was on merchant cooperation and this comprised about one-third of the entire issue of "Retailing," issued Feb. 13, 1933. The program [fol. 483] proposed by him was sponsored by the editor as a national program. In December, 1930, Harper Brothers published a book written by the witness called "Profitable Department Store Management." In this book the witness discussed the problems of merchandising, advertising, store management and control and other items applying to retail and department store management.

Witness has made a study of the nation-wide phase of retailing. He has also studied reports of the Harvard Bureau of Business Research over a period of four or five years. Other authentic sources of information in connection with retailing are the National Retail Dry Goods Association reports and various other publications, such as "Women's Wear" and "Fairchild Directory."

Witness is a member of the board of directors of the Louisville Retail Merchants Association and is also a member of the Kentucky Retail Merchants Association. He is familiar in a general way with the larger merchandising

operations in the State of Kentucky. The National Retail Dry Goods Association has asked him to deliver an address at their mid-year convention in June and witness believes himself to be qualified to give expert opinion as to the conduct of retail merchandising on a large scale and a small scale and the economics pertaining to retail merchandising.

The witness has made a study of the gross sales tax in Kentucky and is familiar in a general way with the taxing process. He has also made a study of the retail sales taxes, as they are commonly known in the United States.

He does not consider the Kentucky Gross Sales Tax to be a real sales tax. A real sales tax applies to all merchants alike. The Kentucky law proposes to place a heavy burden of taxation on those who do a large volume of business and it practically exempts from taxation those who do a small volume. The number doing the small volume constitute the [fol. 484] vast majority. As a result, it operates as a penalty on a few merchants. The witness estimated that in Louisville there would probably be not more than three or four stores, other than food stores, doing a business over one million dollars, and he doubted if there were any more in Kentucky, but there might possibly be one or two. He estimated the number of retail merchants, other than food and dry goods, who do a business in excess of $400,000 to be somewhere between twenty and thirty.

Witness has studied the affidavits filed by the three professors, namely Henry M. Waldradt, James R. Martin and Clyde William Phelps. The figures given in these affidavits, witness testified, were principally for the year 1929. Where they were not drawn for that year, they were for 1927 and 1928, but they all stopped at the end of 1929. The changes that have taken place since 1929 were of so cataclysmic a nature that it was utterly impossible to base anything on what happened in 1927, 1928 and 1929. Those years were not a criterion upon which to base a reasonable opinion. The country during that period was emersed in a tremendous inflation, bubbling over with expansion. The basis since the events occurring in October, 1929 is tremendously different and witness did not believe that we would ever see the day when we would get back to the level of 1929. The years 1927, 1928 and 1929 were entirely abnormal in every respect and this was so when they are compared with either of the years preceding or following them. For this reason, the

three year period mentioned is not a normal basis for present day profits, values or sales. Witness did not believe that there is any difference in opinion between economists or retailers on this point.

Since October, 1929, there has been a decrease in the amount of sales, this being true in every field of merchan-
[fol. 485] dising. The relationship of profits or earnings to sales and the return on invested capital has also declined.

Witness stated that from his examination of the affidavits and exhibits attached to the testimony of Professors Waldradt, Martin and Phelps, he found that the heart of their whole contention was that net profits increased as sales increased. Witness stated that that might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship; some stores with a smaller volume making a higher net profit than some with a larger volume.

The attention of the witness was then called to Exhibit 12 of Professor Martin's deposition and he was asked to point out in the long list of stores included in that exhibit, any department store operating in Kentucky which had a sales volume in excess of five million dollars. Witness replied that there was no department store in the State of Kentucky that had this volume of sales. The Stewart Dry Goods Company, of Louisville, had the largest volume. The maximum in the other large department stores would be from one to two million dollars.

Witness's attention was then called to the table with respect to the alleged increase of profits as sales increased from $400,000 to $1,000,000. He stated that Professor Martin considered only the average figures and from these average figures drew the conclusion that as volume went up the per cent of net profit went up. Witness stated that when the figures were examined closely they showed that average covered a multitude of sins. As an example, they actually indicate that some stores in the lower bracket of volume have a larger per cent of net profit to sales than other stores with a larger volume of sales. The result is that the deduction of Professor Martin, taken from the average does not give a true picture. The true picture, the witness stated, which is proven by the figures, is that the per cent of net profit does not have any definite bear-
[fol. 486] ing to the percentage of volume. A store with a

larger volume of sales can have a smaller amount of profit than another store with a smaller volume of sales. The prime factor is the difference in management. As an example, the witness stated that he would cite the fact that the Emporium, of San Francisco, did twenty million dollars' worth of sales in 1932 and was third in sales in that year, yet it was eighth on the list when the per cent of net profits to sales was figured. Actually, the Emporium, although it had a vast volume of sales, greater than anyone had in the State of Kentucky, lost one and one-half per cent on its sales. In the same year, Lazarus, of Columbus, the eleventh store in the amount of sales, was third in the per cent of net profits. The figures which he was giving, the witness stated, were taken from "Retailing" of May 1, 1933, giving the comparative results of a group of large department stores from the year 1926 up to 1933. These figures are also published in a report of "Fairchild Publications."

The same year, 1932, Burdine's, of Miami, Florida, was eighteenth on the list according to sales but sixth as to per cent of profit to sales. Burdine's had a volume of three million dollars as against twenty million dollars for the Emporium, and yet the latter lost one and one-half per cent and Burdine's made a profit of approximately 1%.

In 1931 Bamburger, of Newark, had sales of thirty-five million dollars and ranked second in amount of sales and yet in regard to profits, it ranks seventh and was preceded by a number of stores with smaller sales. All of these other stores with smaller sales made a larger per cent of net profits than Bamburger.

The same year, 1931, Lazarus, of Columbus, again was eleventh in order of sales and yet was third in the order of profit. The Outlet Company, of Providence, R. I., was first in per cent of net profit but ranked fourteenth in volume of sales.

[fol. 487] In 1930 Filene's, of Boston, with sales of forty-five million dollars ranked first in sales but sixth in per cent of profit on sales. That year Bamburger, of Newark, ranked second in sales and yet was fifteenth in per cent of profit. Bamburger's sales for 1930 were approximately 36 million dollars, or about ten times the amount of the largest sales in Kentucky, but nevertheless its profits were .7%. The same year Lazarus was twelfth in sales and

fourth in per cent of profit. Rike Kumler Company, of Dayton, was nineteenth in sales and third in per cent of profits. The Outlet Company, of Providence, one of the best managed stores in the country, was first in per cent of profit although sixteenth on the list of actual amount of sales. There were fifteen stores that had a bigger volume of sales than the Outlet Company but all of them had a smaller per cent of profit. This indicates that so far as the larger stores are concerned, there is no relation between volume of sales and the per cent of profit to sales. The basic factor in determining the per cent of profit a business makes is management. It does not depend on volume of sales. There are a number of stores with one-half the volume of other stores who make twice the profit of other stores. There is one case in Pennsylvania where, on a volume of $500,000 of sales, the store made over $150,000.00 of profit, or 10% to sales, yet Kaufman Straus Company lost approximately 3½% on the amount of sales and other stores in Louisville lost more than that in 1932.

The figures for stores having sales in excess of five million dollars are referred to because they are used by Professor Martin. However, they are not applicable to Kentucky because no merchant has a volume as large as that. Figures which are applicable are for stores having sales of less than $150,000.00 and those grouped from $150,000 to $300,000; $300,000 to $500,000; $500,000 to $750,000; and $750,000 to $1,000,000. The reports gotten [fol. 488] out by the Harvard Bureau of Business Research defined various groups in this way. The 1932 figures show that the net loss in stores doing less than $150,000 a year was 10.3%. Stores doing a volume of $150,000 to $300,000 showed a loss of 8.7%. Stores doing a business from $300,000 to $500,000, at a 6.2% loss. Stores doing a business of $500,000 to $750,000 has a loss of 8.2%, as against the lower group which only lost 6.2%. In other words, although they increased their volume of business, they lost 2% more than the merchant with a smaller volume. Stores having sales from $750,000 to $1,000,000 showed a loss of 9.5%, which was more than the $500,000 to $750,000 group and more than the $300,000 to $500,000 group. Stores having sales from one to two million dollars lost 6.8%, which figure was higher than the group doing business from $300,000 to $500,000, although it was

less than the two preceding groups. In the two million to four million dollar class the loss was 7.8%. In other words, they lost one per cent more than the store doing from one to — million dollars' worth of business.

The table referred to was thereupon introduced and marked "Schacter Exhibit #1."

The results of the research of Harvard University shows that there is no relationship between the percentage of gain to net worth and increase of sales. Stores doing less than $150,000 worth of business lost 12.2% of their net worth. Stores doing $150,000 to $300,000 lost 9% of their net worth. Stores doing business from $300,000 to $500,000 lost 5% of their net worth. Stores doing a business of $500,000 to $750,000 lost 10% of their net worth, which was twice as much as stores doing a business from $300,000 to $500,000. Stores doing a volume of $750,000 to $1,000,000 lost 6% of their net worth, or one per cent more than stores that had a volume of only $300,000 to $500,000. Stores doing a business of $1,000,000 to $2,000,000 lost 4% of their net worth, and yet stores doing a business of $2,000,000 to $4,000,000 lost 6.7% of their net worth. The loss in these stores was larger than the loss in stores having a smaller volume. This was true as to [fol. 489] the stores having a sales volume of $1,000,000 to $2,000,000, stores with a sales volume of $750,000 to $1,000,000 and stores with a volume of $300,000 to $500,000. This indicates clearly that there is no definite relationship between percentage of net profit to sales or percentage of gain to net worth and sales. Management in both cases is the primary factor.

The same results are reached by examining the figures for 1930 and 1931.

Professor Martin uses Table 34, appearing on page 45 of Bulletin 78 of the Bureau of Research of Harvard University, as an indication that there is an increase in the percentage of profit to sales as sales increase. He files part of this table as Martin Exhibit No. 1. However, there is an important omission. Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales, the

increase in net worth is 15.5%. Professor Martin omits the very important figure of interquartile ranges. For stores under a million dollars, the range is 3.20% to 20.75%. For stores doing over a million dollars worth of sales the interquartile range goes from 10.64% up to 20.35%. That would indicate that there were some stores in the less than one million dollar group that had increased their net worth 20.75%, whereas there were some stores in the over one million dollar class that had a net increase of only 10.64%. The witness here stated that when he referred to increase in net worth he meant the gain in net worth. As a result, the figures used by Professor Martin cover up the important factor that there were some stores in the less than one million dollar group that had twice the gain in net worth as compared with stores in the more than one million dollar group. This proves the opposite of what Professor Martin was trying to prove in this case.

[fol. 490] The best showing in the smaller group is 20.75%. In the larger group the best showing is 20.35%. In other words, the best store of the smaller group had a better showing than the best store in the larger group.

There was thereupon offered in evidence Table 34, appearing on page 44 of Bulletin 78 of the Bureau of Business Research of Harvard University, which was marked Schacter Exhibit 2.

Witness stated that this exhibit was the same exhibit as had been introduced by Professor Martin and marked Martin Exhibit 1, except that the latter had omitted the important inter-quartile figures.

Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures, indicated that he again used the average figures all the way down the line and omitted the inter-quartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of

$2,000,000 he showed a percentage of gain to net worth of 8.5%. He used these figures to prove his point regarding the increase in percentage of gain to net worth as sales increased, but he omitted the inter-quartile ranges in reaching his conclusions. When the inter-quartile ranges are considered, it appears that for stores doing a business of less than $500,000 the percentage of gain to net worth ranges from .84% to 11.17%; for stores doing a business of $500,000 to $2,000,000 the range is 2.88% to 12.17%; stores doing a business of $2,000,000 or over show a range of [fol. 491] 4.23% to 13.02%. The top range for stores doing less than $500,000 showed 11.17% gain. This compares with a gain of only 2.88% for some stores in the next higher bracket. In other words, some stores doing less than $500,000 of business had a four times better showing than some stores in the $500,000 to $2,000,000 group and three times a better showing than some stores which did better than $2,000,000 worth of sales. Witness stated that this led him to conclude that increase in sales volume is no criterion whatever as to what the increase in net gain to net worth will be.

Thereupon, pages 8, 20 and 28 of the Bulletin No. 78 of the Bureau of Business Research of the Harvard University were introduced in evidence and marked Schacter Exhibits 3, 4 and 5.

Witness stated that there has been a very steady drop in the percentage of profit to sales made by larger scale retail merchants engaged in department store business during the five or six years preceding the time of giving his testimony. In 1926 the average was approximately 3% of profits to sales; in 1930 there was an average of loss of .55%; in 1932 there was an average loss of 6.4% to sales.

The policy prevailing throughout the United States so far as retail merchandise department stores are concerned, is to get as large a volume as possible with a small percentage of profit, allowing the volume to produce the net profit. During the years 1930, 1931 and 1932 the average profit for department stores that had made a profit was from 1 to 3% for the best stores. Most of them had lost money. The Hahn Department Stores, on a volume of $90,000,000 worth of sales in 1931, lost $209,000. Hahn Department Stores is a group of department stores all over the country, consisting of 29 stores, the largest one being in Boston. The

closest store to Louisville, was Rollman's, at Cincinnati. Hahn had operated stores in St. Paul, Akron, and a number of other cities. In 1932 Hahn Department Stores, with a volume of $70,000,000 of sales, lost $3,700,000.

[fol. 492] In 1931 Marshall-Field & Company, of Chicago, lost $5,000,000 on a volume of $114,000,000, and in the year 1932, on a volume of $70,000,000, they lost close to $8,000,000.

Arnold Constable, Fifth Avenue, New York, did a volume of $6,300,000 in 1932 and lost $239,000. In 1931 their volume was $9,000,000 and they had a profit of $161,000. In 1930 the volume was $12,000,000 and there was a loss of $562,000. In 1929 they lost $528,000 on a volume of $12,229,000.

Crowley-Milner Company, of Detroit, Michigan, had a volume of $22,500,000 in 1930. Their volume in 1931 and 1932 was not given but it must have been somewhere between $15,000,000 and $21,000,000. In 1931 they lost $579,000 and in 1932 they lost $2,227,000.

Kaufmann Department Stores, of Pittsburgh, one of the finest department stores in the country, had a volume of $22,900,000 and a profit of $648,000 in 1931. In 1932 they had a volume of $16,000,000 and lost $555,000.

Mandel Bros., of Chicago, in 1930 had a volume of $25,000,000 and losses of $867,000. In 1931 they had a volume of $19,600,000 and they lost $371,000. In 1932 the volume was $14,800,000 and they lost $578,000. During the same years there were stores who had a smaller volume of business and made money. For example, the Emporium, of San Francisco, lost $294,000 on a volume of $20,000,000, whereas Burdine's, of Miami, Florida, on a volume of $3,000,000 made $26,700 in the same year. There were some small department stores having sales under a million dollars that made money.

The Kentucky Gross Sales Tax would add to the heavy loss that stores selling more than a million dollars worth of merchandise are bearing, and would impair their capital by the amount of the tax. Stores making an average profit for the years 1930 and 1932 inclusive, would be required to pay from one-third to their entire profit. They would not be able to pass the tax on to the consuming public because [fol. 493] the units of merchandise for the most part are small. When an article sells for fifty cents and a 1% tax

is imposed, the one-half cent cannot be charged a customer, because the article cannot be sold for fifty and one-half cents. Furthermore, they will not be able to compete with stores doing a similar business which are not taxed. Kaufman Straus has a shoe department in its store. There are two dozen shoe departments in Louisville, all of them doing less than $400,000 worth of business a year, and they all pay practically no tax. If Kaufman Straus passes the tax on to the consumer, it would not be able to meet the competition of the other stores. The same is true of hosiery. There are a dozen hosiery stores on Fourth Street doing a small business, and in the ready-to-wear field there are perhaps thirty to forty shops that would practically not be effected by the tax. Kaufman Straus would be subject to a tax, but it could not pass the tax on to the consumer because it could not compete with these other stores unless it kept its prices in line. Some of these other stores do a larger business than the particular department of Kaufman Straus. For example, the shoe department of Kaufman Straus might do a business of $50,000, and competing shoe stores might have a business of $75,000, yet the tax on sales for Kaufman Straus shoe department would be nearly twenty times as large as that imposed upon the competitors. However, Kaufman Straus could not afford to pass the tax on to its customers unless the other stores charged as much as it did.

The witness' attention was then called to Martin Exhibit No. 12 and to the concerns listed therein. He stated that he believed the percentage of profits to sales of the Great Atlantic and Pacific Tea Company was somewhere between one to two per cent.

Both J. C. Penny Company and S. S. Kresge Company, listed in the exhibit, did business in the State of Kentucky. The witness did not know whether American Stores did business in this State.

[fol. 494] Gimbel Brothers, one of the concerns listed, had a volume of $98,000,000 in 1931 and losses of $1,800,000. In 1932 they had a volume of $72,000,000 and losses of approximately $4,500,000.

Federated Department Stores, Hahn Department Stores, and May Department Stores, all of which were listed on the exhibits, did not do any business in Kentucky. The last

named had a volume of $93,000,000 in 1931 and made a profit of $2,197,000; in 1932 they had a volume of $72,500,000 and made $948,000. The witness stated that this is considered to be one of the best managed stores in America. However, the tax would have taken two-thirds of the profits made by this concern.

Both Liggett Brothers and United Cigar Stores Company did business in the State of Kentucky, and both were listed on Exhibit 12. They were both in the hands of a receiver.

W. T. Grant, listed on Exhibit 12, is a 25¢ to $1.00 store, one of the best in America. In 1931 they did a volume of $75,500,000 and made a profit of $2,100,000. In 1932 the volume was $73,000,000 and the profit was $1,500,000. It was one of the best of its kind and only showed a percent of profit of 2.6%.

City Stores did business in Kentucky, Kaufman Straus being a subsidiary. In 1930 City Stores had a volume of $47,000,000, and a profit of $475,000. In 1931 they had a volume of $35,600,000 and a loss of apprxoimately $2,300,000. In 1932 the loss was $1,800,000 on a volume of $29,500,000. The City Stores subsidiary in Louisville, Kaufman Straus, lost approximately $170,000 in 1931. The witness took over the store March 1, 1932, and for that year the store lost $50,000, or $120,000 less than in 1931. The actual operating loss for 1932 was $9,000, the rest being depreciation.

The witness here states that the figures he was giving were taken from "Retailing" of May 1, 1933, and also from "Fairchild's Financial Report" for May, 1933. They are [fol. 495] compiled by these publications from the financial statements as published by the various companies and are considered reliable statistical data. In every case they report the statements which are certified to by reputable accountants.

Mercantile Stores have one store in Louisville, this being J. Bacon and Company, which lost money. National Bellas Hess was in the hands of a receiver. Walgreen Drug Company operated in Louisville but the witness had no information regarding them. McCrory Stores, a five and ten cent store, operate in Louisville and are in the hands of a receiver. The same is true of Schulte Retail Stores.

Fashion Park and F. W. Grant are in the hands of receivers. The last named operates in Kentucky. Child's Restaurant operates in Kentucky and has been through the process of reorganization. Bohack's, a grocery chain, does not operate in Kentucky. J. J. Newberry have a store in Louisville. In 1931, on sales of $31,000,000, they made a profit of $1,000,000; in 1932, on a sales volume of $33,000,000, they made $819,000. They are considered excellent operators and show a 2½% profit in 1932. Shattuck does not operate in Kentucky. Interstate Department Stores have gone through reorganization, the founder of the company having severed his connections with it. In 1931 they had sales of $25,000,000 and a profit of $547,000. In 1932 they had sales of $22,000,000 and a loss of $600,000. The Dominion Stores do not operate in Louisville. McLellan do operate in Kentucky and in 1931 they had a volume of $22,000,000 and profits of $360,000, or 1.6%. Hartman Corporation is a furniture chain which was in the hands of a receiver and has just been sold at auction. Consolidated Retail Stores have had a complete reorganization, having had losses so drastic that they had to go out of business and change their name. Lerner's are doing business in Kentucky. They are asking for reductions from a num-
[fol. 496] ber of their landlords and are threatening bankruptcy if they do not secure the reductions. In 1931 they had a volume of $26,000,000, a profit of $379,000, or 1.4% on sales. Bryant is in bad shape. Their volume for the fiscal year ending May 31, 1931, was $17,700,000, with profits of $227,000. For the years 1931 and 1932 they had a volume of $13,000,000 and losses of $156,000. Neisner operate in Kentucky. In 1930 they had a volume of $16,000,000 and a profit of $330,000. In 1931 their volume was the same, but they lost $639,000. In 1932 their volume was $14,000,000 and they lost $46,800.

Best and Company, Reliable Stores, National Grocery Company, do not operate in Kentucky. The same is true of Ludwig, Bauman & Company and Magnin.

American Department Stores had a volume of $3,300,000 in 1930 on which they suffered a loss of $84,000. In 1931 their volume was $1,700,000 and their losses $168,000. The volume in 1932 is not given. They lost $248,000.

Mangel Stores operate in Kentucky. A receiver was applied for recently and they effected a reorganization and secured a substantial reduction in rentals. Feltman & Curme are in the hands of their bankers. Loft, Inc., is an eastern chain in reorganization. Southern Department Stores operated five stores, two in Louisville, one in Nashville, one in Evansville and one in Birmingham. They closed the Louisville store of John C. Lewis and Company and the Birmingham Store. They are losing money.

Sally Frocks operate in Louisville. They are in the hands of a receiver.

(Here follow photolithographs of Schacter Exhibits, Nos. 1, 2, 3, 4, and 5, side folios 497, 498, 499, 500, 501, 502, 503 and 504.)

EXHIBIT SCHACTER #1

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.0%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
GROSS MARGIN	20.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.09	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
								1.05	1.25	1.35

EXHIBIT SCHACTER #1

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
Gross Margin	20.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
Depreciation (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Professional Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
Total Expense	36.4%	35.9%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
Net Profit or Loss	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 4.9%	L. 4.7%
Net Other Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
Net Gain:										
Percentage of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
Percentage of Net Worth	L. 12.2	L. 9.0	L. 5.0	L. 10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	*
Rate of Stock-turn (times a year): Based on Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Returns and Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
Initial Mark-up (percentage of original retail value):										
On Net Cost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
Mark-downs	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Discounts to Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
Stock Shortages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Total Retail Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
Sales per Square Foot of Total Space	$8.00†	$9.00†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Sales/Total Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
% Cash and C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	†50.25%	46.5%†	48.4%	46.7%	48.5%	56.3%
% Charge and Installment Sales	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
% of Firms Earning Some Net Profit	6.4%	0.9%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
% of Firms Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

* Data not available.
† Figures for this item were given on less than 75% of the reports used.

324A

EXHIBIT SCHACTER #2

Table 34. Operating Results of 64 Specialty Stores Reporting for 1928

Net Sales = 100%

	Net Sales less than $1,000,000			Net Sales over $1,000,000		
	Common Figure	Interquartile Range† (Middle 50% of Items) From	To	Common Figure	Interquartile Range† (Middle 50% of Items) From	To
Number of Firms	36			28		
Aggregate Sales	$14,779,030			$156,865,993		
Typical Net Sales	400,000	$185,000	$625,000	3,250,000	$2,700,000	$4,500,000
Total Merchandise Costs	67.2%	65.62%	69.88%	64.7%	63.52%	65.97%
Gross Margin	32.8	30.64	34.38	35.3	34.03	36.48
*Functional Division of Salaries and Wages:**						
Executive				1.45%	0.96%	1.65%
Other Administrative				0.6	0.43	0.67
Office				1.65	1.31	1.75
Occupancy				0.85	0.65	0.99
Publicity				0.7	0.58	0.75
Buying				3.25	2.48	3.57
Receiving, Marking, and Stock-room				0.3	0.21	0.35
Direct Selling				5.15	4.76	5.56
Managers and Assistants				0.45	0.28	0.66
Indirect Selling				1.2	0.72	1.59
Delivery				0.5	0.27	0.65
Total Salaries and Wages	15.5%	13.50%	17.78%	16.1%	14.85%	16.57%
Rentals	4.8	3.54	6.65	3.85	2.56	4.99
Advertising	3.4	2.66	4.49	3.85	2.90	4.65
Taxes	0.35	0.11	0.53	0.4	0.27	0.55
Interest	2.1	1.54	2.70	1.8	1.43	2.38
Supplies	1.0	0.73	1.36	1.5	1.32	1.59
Service Purchased	0.85	0.46	1.29	0.65	0.46	0.85
Unclassified	0.8	0.47	1.15	1.05	0.70	1.24
Travelling	0.7	0.36	0.99	0.65	0.48	0.77
Communication	0.4	0.24	0.47	0.35	0.28	0.39
Repairs	0.2	0.10	0.31	0.25	0.15	0.42
Insurance	0.5	0.31	0.64	0.4	0.21	0.52
Depreciation:						
Losses from Bad Debts	0.35	0.13	0.53	0.35	0.15	0.56
Other Depreciation	0.7	0.52	1.13	0.8	0.65	0.92
Professional Services	0.25	0.15	0.47	0.3	0.22	0.42
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
*Expenses by Functional Groups:**						
Total Administrative and General				7.4%	6.50%	7.88%
Total Occupancy				6.1	5.46	6.69
Total Publicity				5.7	4.72	6.57
Total Buying				4.5	3.21	5.01
Total General Selling				7.7	7.10	8.38
Total Delivery				0.9	0.63	1.14
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
Net Profit	0.9%	*Loss 0.73%*	2.91%	3.0%	2.08%	5.16%
Total Net Gain:						
Percentage of Net Sales	2.8%	0.93%	5.25%	5.8%	4.56%	8.08%
Percentage of Net Worth	8.9%	3.20%	20.75%	15.5%	10.64%	20.35%
Rate of Stock-turn (times a year):						
Based on beginning and ending inventories	3.9	2.63	5.52	5.9	4.65	7.15
Based on monthly inventories	4.0	3.07	5.03	4.6	3.65	6.14
Returns and Allowances	8.2%	5.74%	11.40%	14.3%	10.53%	17.31%

†Neither the high nor the low figures, of course, are all for any one firm; consequently, they cannot be totalled.

*Percentages for these items were based on 23 reports; data on the other reports were not in sufficient detail to permit their use.

Exhibit A

3248

EXHIBIT SCHACTER #3

Table 3. Typical Operating Results of Department Stores with Net Sales of $2,000,000 or More: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$2,000,000–$3,999,000	$4,000,000–$9,999,000	$10,000,000 or more
	Number of Reports[1]	133			58	46	29
1	Aggregate Sales (in thousands)	$1,190,523			$197,398	$317,051	$676,074
2	Typical Net Sales (in thousands)	$5,200	$3,000	$9,000	$2,800	$6,000	$18,500
3	Index of Change in Sales	101.2	97.42	105.39	100.9	100.6	102.4
4	Size of City	300,000	140,000	632,000	130,000	360,000	900,000
5	Net Profit or Loss	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
6	Total Merchandise Costs	66.4%	65.11%	68.04%	67.1%	66.3%	65.6%
7	GROSS MARGIN	33.6	31.96	34.89	32.9	33.7	34.4
8	Total Pay Roll	16.8%	15.62%	17.60%	16.6%	16.7%	17.0%
9	Fixed Plant and Equipment Costs[3]	4.9	4.06	5.67	4.9	4.7	5.1
10	Advertising	3.45	2.70	4.19	3.4	3.6	3.3
11	Taxes[4]	0.3	0.23	0.48	0.35	0.35	0.3
12	Interest[4]	2.0	1.66	2.36	2.1	2.1	1.85
13	Supplies	1.65	1.33	1.91	1.5	1.75	1.7
14	Service Purchased	0.65	0.46	0.99	0.75	0.7	0.5
15	Unclassified: Losses from Bad Debts	0.3	0.15	0.41	0.3	0.3	0.25
16	Unclassified: Other[5]	0.85	0.61	1.04	0.8	0.8	0.85
17	Travelling	0.45	0.30	0.58	0.5	0.45	0.35
18	Communication	0.35	0.28	0.41	0.35	0.35	0.35
19	Repairs[4]	0.35	0.22	0.48	0.3	0.3	0.5
20	Insurance[4]	0.25	0.19	0.34	0.25	0.25	0.2
21	Depreciation[4]	0.1	0.05	0.12	0.1	0.1[6]	0.1
22	Professional Services[5]	0.4	0.22	0.57	0.4	0.35	0.45
23	TOTAL EXPENSE	32.8%	30.91%	34.76%	32.6%	32.8%	32.8%
24	NET PROFIT OR LOSS	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
25	Net Other Income	3.4	2.71	4.38	3.4	3.0	3.7
26	NET GAIN: Percentage of Net Sales	4.2%	1.63%	6.58%	3.7%	3.9%	5.3%
27	NET GAIN: Percentage of Net Worth	8.5%	4.23%	13.02%	7.6%	8.1%	11.3%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	4.2	3.46	4.94	3.9	4.0	4.6
29	Based on Monthly Inventories	3.6	2.92	4.22	3.3	3.6	4.0
30	Returns and Allowances	10.5%	8.18%	13.40%	8.5%	10.6%	14.0%
31	Mark-downs	6.6	5.85	7.64	6.7	6.6	6.6
32	Inward Freight, Express, and Truckage	0.9[6]	0.65	1.20	1.05	0.95	0.65[6]
33	Cash Discounts Received on Purchases of Merchandise	2.7	2.39	3.11	2.5	2.8	3.1
34	Alteration and Workroom Costs	0.65	0.39	1.08	0.75[6]	0.7	0.6

[1] Where chains of stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 133 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The report figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57–59.

[5] The item, Professional Services, has been expanded to include membership dues, and fees in buying associations and in domestic and foreign buying offices; amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

Exhibit B

324C

EXHIBIT SCHACTER #3 (Continued)

Table 3. — (*Continued*)

Grouped According to Sales Increase or Decrease (1928–29)[1]			Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales			Population			Net Loss		Net Profit		
Less than 100.0	100.0–105.0	105.0 or more	Less than 250,000	250,000–499,000	500,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
44	43	31	59	32	40	25	30	29	41	1
$292,253	$331,327	$408,638	$211,895	$251,025	$690,680	$141,891	$216,000	$258,316	$531,871	
$4,800	$5,700	$5,200	$3,000	$5,900	$11,000	$4,500	$4,000	$5,000	$6,600	2
95.7	101.6	109.0	101.2	102.0	101.2	99.3	99.5	101.7	102.9	3
300,000	250,000	350,000	100,000	310,000	800,000	300,000	250,000	225,000	350,000	4
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	5
67.0%	66.5%	65.8%	67.3%	66.0%	65.5%	67.8%	67.2%	66.8%	65.3%	6
33.0	33.5	34.2	32.7	34.0	34.5	32.2	32.8	33.2	34.7	7
17.1%	16.6%	16.9%	16.6%	16.9%	16.9%	17.8%	17.1%	16.5%	16.2%	8
4.75	4.7	5.3	4.9	4.95	4.95	5.75	5.0	4.7	4.7	9[4]
3.85	3.0	3.4	3.0	3.75	3.85	4.25	4.0	3.25	2.7	10
0.35	0.3	0.3	0.35	0.35	0.3	0.3	0.3	0.3	0.35	11[4]
2.05	2.05	2.0	2.15	1.95	1.85	2.0	2.05	2.0	1.9	12[4]
1.65	1.6	1.7	1.55	1.75	1.7	1.8	1.6	1.6	1.6	13
0.65	0.65	0.7	0.7	0.65	0.65	0.7	0.75	0.65	0.55	14
0.3	0.25	0.3	0.3	0.3	0.25	0.3	0.3	0.3	0.2	15
0.75	0.8	0.85	0.8	0.75	0.8	0.85	0.75	0.75	0.8	16[4]
0.4	0.4	0.55	0.5	0.5	0.4	0.45	0.5	0.4	0.45	17
0.35	0.35	0.35	0.3	0.35	0.35	0.4	0.35	0.3	0.3	18
0.4	0.3	0.25	0.3	0.35	0.45	0.35	0.3	0.3	0.45	19[4]
0.25	0.2	0.2	0.25	0.25	0.25	0.35	0.25	0.25	0.25	20[4]
0.1	0.05	0.1	0.1	0.05	0.1	0.1	0.1	0.05	0.1	21[4]
0.35	0.35	0.5	0.4	0.35	0.5	0.5	0.45	0.45	0.35	22[4]
33.3%	31.6%	33.4%	32.2%	33.2%	33.3%	35.9%	33.8%	31.8%	30.9%	23
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	24
3.5	3.3	3.2	3.7	2.9	3.3	2.9	3.4	3.4	3.7	25
3.2%	5.2%	4.0%	4.2%	3.7%	4.5%	*Loss 0.8%*	2.4%	4.8%	7.5%	26
5.9%	10.1%	10.7%	8.7%	6.9%	9.4%	*Loss 1.5%*	5.5%	10.5%	14.3%	27
4.0	4.0	4.5	3.8	4.3	4.7	4.2	4.1	4.3	4.3	28
3.5	3.5	3.7	3.2	3.8	4.0	3.6	3.5	3.6	3.7	29
9.7%	10.1%	11.9%	8.6%[5]	10.8%	13.7%	12.5%	10.4%	9.3%	10.5%	30
6.8	6.5	6.55	6.5	6.85	6.5	6.7	7.2	6.2	6.5	31
0.9	0.9	1.0	1.1	0.95	0.65	0.9	0.9	0.9	0.8	32
2.55	2.75	2.8	2.4	2.9	3.2	2.7	2.7	2.65	2.75	33
0.65	0.95[6]	0.45	0.75[6]	0.6[6]	0.7	0.75	0.5	0.85	0.6[6]	34

500

324D

EXHIBIT SCHACTER #4

Table 9. Typical Operating Results of Department Stores with Net Sales of from $500,000 to $1,999,000: 1929

(Net Sales = 100%)

Item No.		Common Figure[1]	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$500,000–$749,000	$750,000–$999,000	$1,000,000–$1,999,000
	Number of Reports	168			59	36	73
1	Aggregate Sales (in thousands)	$169,606			$35,825	$32,642	$101,139
2	Typical Net Sales (in thousands)	$910	$650	$1,260	$690	$850	$1,300
3	Index of Change in Sales	98.5	94.34	102.68	98.3	99.0	98.3
4	Size of City	55,000	30,000	113,000	35,000	50,000	75,000
5	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
6	Total Merchandise Costs	68.2%	66.38%	69.89%	68.5%	68.2%	67.9%
7	Gross Margin	31.8	30.11	33.12	31.5	31.8	32.1
8	Total Pay Roll	16.6%	15.11%	18.23%	16.9%	16.2%	16.7%
9	Fixed Plant and Equipment Costs[3]	4.5	3.66	5.48	4.5	4.5	4.5
10	Advertising	3.0	2.35	3.62	2.6	3.2	3.2
11	Taxes[4]	0.45	0.27	0.68	0.6	0.45	0.4
12	Interest[4]	2.4	1.93	2.84	2.6	2.45	2.3
13	Supplies	1.3	0.92	1.55	1.0	1.4	1.4
14	Service Purchased	0.85	0.61	1.14	0.85	0.95	0.8
15	Unclassified: Losses from Bad Debts	0.25	0.14	0.43	0.25	0.25	0.25
16	Unclassified: Other[5]	0.8	0.42	1.20	0.7	1.1	0.7
17	Travelling	0.45	0.28	0.64	0.45	0.45	0.45
18	Communication	0.35	0.25	0.44	0.35	0.3	0.35
19	Repairs[4]	0.3	0.18	0.46	0.3	0.3	0.25
20	Insurance[4]	0.4	0.27	0.51	0.45	0.4	0.35
21	Depreciation[4]	0.05[6]	0.04	0.11	0.05[6]	0.05[6]	0.05
22	Professional Services[5]	0.3	0.14	0.54	0.3	0.3	0.3
23	Total Expense	32.0%	28.96%	34.73%	31.9%	32.3%	32.0%
24	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
25	Net Other Income	3.3	2.46	4.28	3.6	3.5	3.0
26	Net Gain: Percentage of Net Sales	3.1%	0.71%	5.24%	3.2%	3.0%	3.1%
27	Net Gain: Percentage of Net Worth	7.5%	2.88%	12.17%	6.8%	6.6%	8.4%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	3.3	2.66	4.03	2.7	3.4	3.6
29	Based on Monthly Inventories	2.8[6]	2.37	3.38	2.3[6]	3.0	3.0
30	Returns and Allowances	6.8%[6]	4.34%	9.70%	6.1%[6]	7.3%[6]	7.3%
31	Mark-downs	7.2[6]	5.69	9.27	8.8[6]	7.9[6]	6.5[6]
32	Inward Freight, Express, and Truckage	1.0	0.80	1.21	1.1	1.05	0.9
33	Cash Discounts Received on Purchases of Merchandise	2.5	2.20	2.82	2.5	2.5	2.5
34	Alteration and Workroom Costs	0.5[6]	0.20	0.96	0.4[6]	0.6[6]	0.55

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 168 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57-59.

[5] The item, Professional Services, has been expanded to include membership, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

501

Exhibit e

324E

EXHIBIT SCHACTER #4 (Continued)

Table 9. — (Continued)

Grouped According to Sales Increase or Decrease (1928–29)[1]				Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.9	100.0–104.9	105.0 or more	Less than 50,000	50,000–99,999	100,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
41	43	30	22	82	36	47	40	43	44	27	1.
$40,611	$44,653	$31,214	$22,787	$69,528	$38,426	$58,037	$40,507	$43,957	$43,005	$28,068	
$900	$940	$1,000	$900	$730	$990	$1,200	$900	$875	$940	$950	2
91.4	97.8	102.5	109.0	98.8	96.5	99.6	93.8	99.4	100.0	101.0	3
50,000	60,000	60,000	55,000	30,000	55,000	150,000	95,000	50,000	50,000	50,000	4
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	5
69.0%	67.9%	68.5%	67.9%	68.5%	67.2%	68.2%	68.5%	68.3%	68.3%	68.1%	6
31.0	32.1	31.5	32.1	31.5	32.8	31.8	31.5	31.7	31.7	31.9	7
16.9%	16.9%	16.2%	16.3%	16.4%	17.8%	16.4%	17.6%	17.2%	16.3%	14.7%	8
4.35	4.6	4.3	4.7	4.25	4.5	5.1	5.55	4.55	4.25	3.85	9[4]
3.0	3.0	2.85	2.9	2.5	3.25	3.6	3.85	2.95	2.55	2.5	10
0.6	0.5	0.4	0.3	0.55	0.45	0.4	0.6	0.4	0.35	0.4	11[4]
2.6	2.45	2.3	2.2	2.5	2.45	2.25	2.7	2.4	2.3	2.1	12[4]
1.3	1.4	1.3	1.2	1.2	1.4	1.35	1.4	1.4	1.3	0.95	13
0.9	0.9	0.8	0.85	0.8	1.05	0.85	0.95	0.9	0.8	0.75	14
0.25	0.25	0.3	0.25	0.25	0.25	0.25	0.35	0.2	0.25	0.25	15
0.85	0.75	0.85	0.8	0.75	0.65	0.85	0.9	0.75	0.8	0.65	16[5]
0.55	0.5	0.35	0.35	0.45	0.5	0.45	0.55	0.45	0.4	0.4	17
0.35	0.4	0.35	0.3	0.35	0.35	0.35	0.35	0.35	0.35	0.3	18
0.3	0.3	0.3	0.25	0.3	0.3	0.25	0.3	0.35	0.25	0.25	19[4]
0.4	0.4	0.4	0.4	0.4	0.35	0.35	0.4	0.35	0.4	0.35	20[4]
0.1[4]	0.05	0.1[4]	0.1[4]	0.05[4]	0.05[4]	0.05	0.05[4]	0.05[4]	0.05[4]	0.05[4]	21[4]
0.35	0.3	0.2	0.2	0.25	0.35	0.3	0.35	0.3	0.25	0.3	22[5]
32.8%	32.7%	31.0%	31.1%	31.0%	33.7%	32.8%	35.9%	32.6%	30.6%	27.8%	23
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	24
3.7	3.3	3.2	3.2	3.5	2.9	3.1	3.4	3.4	3.3	2.6	25
1.9%	2.7%	3.7%	4.2%	4.0%	2.0%	2.1%	*Loss 1.0%*	2.5%	4.4%	6.7%	26
5.2%	6.3%	8.8%	10.2%	8.6%	6.1%	6.8%	*Loss 2.0%*	5.9%	10.4%	18.0%	27
3.0	3.4	3.5	3.5	3.2	3.1	3.6	3.0	3.0	3.5	4.1	28
2.6[4]	2.9	2.8[4]	3.25	2.8[4]	2.7	3.0	2.6	2.6	2.9	3.5[4]	29
Data Insufficient				7.2%[4]	7.5%[4]	5.5%[4]	Data Insufficient				30
Data Insufficient				7.6[4]	7.1[4]	6.7[4]	Data Insufficient				31
0.95%[4]	0.95%	1.0%	1.05%	1.1	1.0	0.85	1.0%[4]	1.0%	1.0%	1.1%	32
2.5	2.65	2.4	2.3	2.5	2.55	2.55	2.5	2.45	2.6	2.5	33
0.4[4]	0.55[4]	0.65[4]	0.5[4]	0.5[4]	0.5[4]	0.5[4]	0.4	0.8[4]	0.6[4]	0.4[4]	34

EXHIBIT SCHACTER #5

Table 14. Typical Operating Results of Department Stores with Net Sales of less than $500,000: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[1] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	Less than $150,000	$150,000-$299,000	$300,000-$499,000
	Number of Reports[2]	226			59	83	84
1	Aggregate Sales (in thousands)	$59,137			$7,916	$18,640	$32,581
2	Typical Net Sales (in thousands)	$230	$150	$350	$94	$200	$380
3	Index of Change in Sales	99.1	93.89	103.49	98.3	99.3	99.4
4	Size of City	15,000	6,000	25,000	5,000	10,000	25,000
5	Net Profit or Loss	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
6	Total Merchandise Costs	70.7%	68.24%	73.16%	71.1%	71.3%	69.8%
7	Gross Margin	29.3	26.82	31.76	28.9	28.7	30.2
8	Total Pay Roll	16.1%	13.76%	18.03%	15.6%	16.0%	16.6%
9	Fixed Plant and Equipment Costs[4]	3.9	2.80	4.85	3.8	3.6	4.1
10	Advertising	2.4	1.42	3.11	2.0	2.4	2.65
11	Taxes[4]	0.6	0.34	0.88	0.65	0.6	0.6
12	Interest[4]	2.9	2.25	3.39	3.4	2.9	2.6
13	Supplies	0.85	0.54	1.18	0.75	0.85	0.9
14	Service Purchased	0.9	0.61	1.18	0.9	0.9	0.9
15	Unclassified: Losses from Bad Debts	0.3	0.13	0.52	0.4[5]	0.3	0.3
16	Unclassified: Other[4]	0.55	0.25	0.93	0.5	0.55	0.55
17	Travelling	0.4	0.19	0.57	0.3[5]	0.45	0.4
18	Communication	0.35	0.20	0.43	0.35	0.3	0.35
19	Repairs[4]	0.25[5]	0.12	0.40	0.2[5]	0.2[5]	0.25
20	Insurance[4]	0.55	0.36	0.71	0.65	0.5	0.5
21	Depreciation[4]	0.1[5]	0.00	0.14	0.1[5]	0.1[5]	0.1[5]
22	Professional Services[3]	0.15[5]	0.09	0.37	0.2[5]	0.15[5]	0.2[5]
23	Total Expense	30.3%	26.71%	32.97%	29.8%	29.8%	31.0%
24	Net Profit or Loss	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
25	Net Other Income	3.3	2.40	4.22	3.9	3.1	3.0
26	Net Gain: Percentage of Net Sales	2.3%	0.56%	4.65%	3.0%	2.0%	2.2%
27	Net Gain: Percentage of Net Worth	5.7%	0.84%	11.17%	6.3%	5.0%	6.0%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	2.4	1.92	3.00	1.9	2.4	2.8
29	Based on Monthly Inventories	2.0[6]	1.63	2.53	1.8[6]	1.9[6]	2.3[6]
30	Returns and Allowances	2.4%[6]	1.09%	4.24%	1.7%[6]	1.7%[6]	3.5%[6]
31	Mark-downs	7.2[6]	5.09	9.71	Data Insufficient		
32	Inward Freight, Express, and Truckage	1.2	0.91	1.49	1.15%	1.2%	1.15%
33	Cash Discounts Received on Purchases of Merchandise	2.4	1.87	2.89	2.1	2.5	2.4
34	Alteration and Workroom Costs	0.45[6]	0.33	0.71	0.2[6]	0.5[6]	0.5[6]

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. Where a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 226 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57-59.

[5] The item, Professional Services, has been expanded to include memberships, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

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EXHIBIT SCHACTER #5 (Continued)

Table 14. — (Continued)

Grouped According to Sales Increase or Decrease (1928–29)[a]				Grouped According to Size of City[a]			Grouped According to Rate of Profit or Loss[a]				Item No.
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.0	100.0–104.9	105.0 or more	Less than 10,000	10,000–24,999	25,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	
49	50	52	29	89	67	54	77	57	50	36	1
$12,005	$12,531	$12,214	$8,577	$16,110	$18,639	$17,303	$20,092	$14,579	$14,144	$8,736	
$220	$225	$210	$285	$160	$270	$330	$220	$230	$260	$200	2
90.3	97.7	102.4	110.2	99.2	99.4	98.6	96.0	100.4	99.8	102.2	3
10,000	15,000	15,000	15,000	5,000	15,000	40,000	15,000	15,000	15,000	10,000	4
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	5
70.0%	71.2%	70.8%	71.4%	71.8%	70.2%	69.5%	71.3%	70.2%	70.5%	70.0%	6
30.0	28.8	29.2	28.6	28.2	29.8	30.5	28.7	29.8	29.5	30.0	7
17.0%	15.9%	16.1%	14.7%	15.8%	16.1%	17.0%	17.4%	16.8%	14.9%	14.0%	8
4.3	3.65	3.6	3.6	3.45	3.9	4.4	4.1	3.8	3.8	3.2	9[d]
2.5	2.25	2.0	2.1	1.7	2.45	3.25	2.75	2.35	2.1	2.05	10
0.75	0.6	0.65	0.45	0.7	0.6	0.5	0.7	0.65	0.55	0.5	11[d]
3.2	2.8	2.8	2.55	3.2	2.75	2.45	3.35	2.75	2.75	2.4	12[d]
1.0	0.8	0.8	0.8	0.8	0.95	0.9	1.05	0.9	0.75	0.75	13
1.0	0.9	0.85	0.75	0.85	0.95	0.9	1.05	0.9	0.85	0.75	14
0.25	0.35	0.3	0.3	0.35	0.35	0.2	0.3	0.3	0.35	0.25	15
0.6	0.35	0.6	0.8	0.5	0.6	0.6	0.6	0.55	0.6	0.4	16[b]
0.4	0.35	0.4	0.35	0.3	0.45	0.4	0.45	0.45	0.35	0.3	17
0.35	0.3	0.3	0.3	0.3	0.35	0.3	0.35	0.35	0.3	0.3	18
0.2	0.25	0.2	0.3[b]	0.2[b]	0.2[b]	0.3	0.25	0.15[b]	0.25[b]	0.2	19[b]
0.6	0.5	0.55	0.4	0.55	0.5	0.5	0.6	0.5	0.5	0.45	20[b]
0.1[b]	0.05[b]	0.1[b]	0.05[b]	0.05[b]	0.05[b]	0.1[b]	0.05[b]	0.1[b]	0.1[b]	0.05[b]	21[b]
0.15[b]	0.25[b]	0.15[b]	0.15[b]	0.15[b]	0.2[b]	0.2[b]	0.2[b]	0.15[b]	0.15[b]	0.2[b]	22[b]
32.4%	29.3%	29.4%	27.6%	28.9%	30.4%	32.0%	33.2%	30.7%	28.3%	25.8%	23
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	24
3.6	2.9	3.3	2.8	3.7	2.9	3.1	3.6	3.1	2.8	2.8	25
1.2%	2.4%	3.1%	3.8%	3.0%	2.3%	1.6%	*Loss 0.9%*	2.2%	4.0%	7.0%	26
1.7%	5.8%	6.3%	11.7%	5.6%	5.7%	5.7%	*Loss 2.0%*	4.8%	10.5%	16.5%	27
2.0	2.5	2.5	2.8	2.2	2.4	2.8	2.1	2.4	2.5	3.1	28
1.7[b]	2.3[b]	2.1[b]	2.3[b]	1.8[b]	2.0[b]	2.3[b]	1.8[b]	2.1[b]	2.0[b]	2.5[b]	29
Data Insufficient				2.0%[b]	2.6%[b]	3.0%[b]	Data Insufficient				30
Data Insufficient				Data Insufficient			Data Insufficient				31
1.3%	1.15%	1.05%	1.2%	1.2%	1.2%	1.2%	1.2%	1.2%	1.05%	1.25%	32
2.5	2.4	2.45	2.2	2.2	2.6	2.55	2.25	2.4	2.4	2.5	33
0.45[b]	0.35[b]	0.5[b]	0.45[b]	0.35[b]	0.6[b]	0.5[b]	0.4[b]	0.35[b]	0.45[b]	0.6[b]	34

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[fol. 505] Jerry King

JERRY KING, called for the defendants, testified as follows:

He was bookkeeper in the Treasurer's office of the Commonwealth of Kentucky and as such had charge of the books in that office. The records showed the following receipts in the general expenditure fund for the fiscal year ending June 30 as follows:

1926	$ 7,706,538.28
1927	8,059,517.85
1928	8,041,609.73
1929	9,970,769.20
1930	11,068,942.30
1931	11,573,065.01
1932	9,560,305.16
1933	9,502,871.52

Refunds for taxes erroneously paid are always paid in cash. Recent payments of refunds have been on inheritance taxes and beer licenses. These amounted to approximately $125,000.00 and are paid in cash without regard to outstanding warrants.

Cross-examination:

The witness has been connected with the Treasurer's office since January, 1932, and he knew nothing about the administration of affairs of the office except through previous records. He had no personal knowledge as to how refunds were handled prior to that time but he has never run across any case where refund was made other than by cash. He did not think that any warrants were ever issued in such cases and he had never run across any. Money is not paid out without a warrant, which is drawn and presented to the Treasurer. In some cases warrants are simply interest bearing. The figures the witness had given in his direct examination did not give account of the liability outstanding against the general fund through 1926 to 1932. Actually, on June 30, 1933, there were outstanding against the general expenditure fund interest bearing warrants to the amount of $15,197,005.42. There were other outstanding warrants against the school fund and road fund. Beer

tax refund has been paid. Before it was paid it was kept [fol. 506] in the general sinking fund and was set up as a beer license tax fund, having been set apart particularly, so much money being kept in the particular account. Witness considered this a minor fund coming under the general head "general expenditure fund." The refund was paid from one fund, the general expenditure fund, except there was a different set up for each account and it was paid out of the general account. Payment was made on warrants which they presented from the Auditor, which the Treasurer honored. The warrants showed that it was drawn against the account for beer license fund.

Witness thereupon exhibited a warrant drawn by the Auditor of Public Accounts upon the State Treasurer of Kentucky, dated June 27, 1933, stamped "Paid July 13, 1933." The warrant was for $7,125.00 and was payable to G. J. Sheehan and others, $75.00 being due to each of the persons named. The witness stated that payment was made to the people named on the warrant. These persons had not brought any suit and had not recovered any judgment on the fund. At the time the payment was made there were over Fifteen Million Dollars worth of warrants outstanding. The oldest warrant had been outstanding since July, 1927.

Warrants drawn by the Auditor are all separately numbered. The one exhibited was designated No. F-12104. The witness stated that this warrant showed on its face that it was to be paid and charged to the beer license tax fund. The Treasurer, Mr. Huddleston, directed that payment should be made in cash for this particular warrant. He determined whether they should be paid out of order or not. The practice it to pay a warrant when it is presented if it is possible to pay it. If the money is low the Treasurer declines to pay it and turns it back to the holder, stamping it "interest bearing." To the knowledge of the witness the Treasurer pays warrants according to priority, either paying cash or stamping the warrant "interest bear- [fol. 507] ing." There has been no time since January, 1932, when the State Treasurer was able to pay out of the general expenditure fund all of the outstanding warrants against that fund. The Treasurer has made two calls for interest paying warrants during the year preceding the time of the giving of the testimony. He called

a couple of hundred thousand of outstanding warrants dated 1927. Calls for presentation of outstanding warrants apply to the oldest warrants. The two calls made by the State Treasurer did not embrace any warrants that were issued later than July, 1927. All warrants since July, 1927, remained unpaid and they are not paid by the State Treasurer except in order of their issuance when funds are available for that purpose. The only warrants which the State Treasurer has assumed to pay out of order are those which are not stamped interest bearing. In the case of those warrants the owner has to take a chance of getting his money when the State Treasurer has the money to pay. The latter cannot pay all the warrants outstanding which are not marked interest bearing and for this reason he must select some for payment.

Re-examination:

A warrant is merely an order of the Auditor of Public Accounts to the Treasurer of the State of Kentucky to issue a check to the designated payee for a given amount of money. Since the witness has been bookkeeper it has been the practice and custom to pay refunds of taxes in cash. Warrants are divided into two general classes. Those stamped "interest bearing" and those that are not stamped "interest bearing." There are approximately Fifteen Million Dollars worth of outstanding interest bearing warrants. Those warrants are not called ahead of claims against the general expenditure fund. A warrant issued in payment of a judgment or a claim for refund of taxes would be given a preference over the other outstanding warrants even though the latter were older. This has been the practice in refunding inheritance taxes, beer taxes [fol. 508] and other taxes that the court decided were improperly paid. The income into the State Treasurer's office runs from Seven Million to Eleven Million Dollars a year. Some money comes in every day. If a warrant for a sum as large as $200,000.00 should be presented sufficient money would be accumulated in the fund to pay the warrant in cash within a week or ten days, provided no other claims were paid out of the fund during that period. The witness went on to say, however, that he did not know whether such a large warrant would be paid in the event other claims such as salary for State employees were presented.

If the warrant presented was marked interest bearing it would not be paid and might not be paid for a period of five or six years. Since the witness had been in the State Treasurer's office payments had not been made on interest bearing warrants except when there was a call and they were then paid in the order of their issuance.

James W. Martin

JAMES W. MARTIN, called for the defendants, testified as follows:

He was the same James W. Martin who testified by affidavit in the case in 1930. Since that time he has continued his work with the University of Kentucky as Director of business research. He has followed the general line that he had been in at the time the affidavit was made. He had emphasized specially on tax research rather than on general business research. He has been continuously engaged in the study of taxation since that time and has issued several reports and at the request of the Attorney General's office the Bureau of Business Research had made some further investigation in connection with the gross sales tax and also in connection with the Kentucky oleomargarine tax enacted by the Legislature of Kentucky. At the request of the Attorney General the witness had prepared [fol. 509] certain exhibits designed to supplement the information already in the record respecting the effective tax rates of Kentucky as compared with those in other states and countries. The witness thereupon produced the exhibit which was introduced as Martin Exhibit No. 17 and stated that this showed the maximum gross sales tax rate imposed on retailers in the various states and foreign countries. Witness then produced an exhibit in the form of a table showing the effective tax rate on gross sales in Kentucky as compared with other states. This was introduced as Martin Exhibit No. 18.

The witness then introduced the chart introduced as Exhibit 19, showing the net gain of department stores in 1929 to percentage of net worth. Witness then stated that Exhibit 17 was a tabulation of the rates imposed on gross sales in seventeen states and in seventeen foreign or extra continental possessions of the United States. This table included all of the states on which the bureau with which he was connected had any authentic information and pur-

ported to include New Mexico and North Carolina in addition. The statutes of the last two states had been examined and the data given in the table was accurate. The left-hand part of the table indicates the states having the maximum gross sales tax applicable ranging from one-tenth of one per cent to five per cent in the State of Utah. The right-hand part of the table shows that various foreign countries and extra continental possessions of the United States have gross sales taxes ranging from less than one per cent to a maximum of over ten per cent. All of these taxes are placed directly in volume of sales.

Exhibit 18, the witness stated, showed the effective tax rate on gross sales in Kentucky and compared it with those in other states having graduated retail sales taxes. Computations had been made for various amounts ranging up to Twelve Million Dollars and the figures were shown in the right-hand column in such a way as to indicate exactly the effect of the tax rate on the total amount of sales as indicated in the left-hand column of figures. The chart [fol. 510] attached to and made a part of the exhibit showed exactly the same kind of data in graphic form as the rates for Kentucky, being shown in the bottom line; the rates for Minnesota in the next highest line and the rates for New Mexico and Vermont still higher. The chart, the witness stated, was accurate at the various points indicated in the totals and the lines were conventional between those points. The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked "Average" were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the testimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty percent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent

of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing his chart he did not [fol. 511] use the data used by Mr. Schacter but he drew it from the original source. When Exhibits 18 and 19 are compared the most important figures are the figures giving the average as far as Exhibit 19 is concerned. The witness did not mean to suggest by his testimony that every department store behaves according to the picture that he presented, but the general average in department store business did behave that way. Consequently, the average was the more satisfactory figure.

The data respecting Kentucky was the most important figure in Exhibit 18 and the comparison of effective tax rate for Kentucky as shown by the chart of Exhibit 18 shows a remarkable resemblance to the curve of the average earnings on net worth of department stores as shown in Exhibit 19.

In imposing progressive business taxes, it is customary that the levy apply against the entire business as a unit rather than against the individual operating divisions. This is true with respect to general business taxes. This has been the case with respect to excess profit taxes of the Federal Government. With respect to Mississippi and Wisconsin, it is true of the graduated income tax. In Maine it is true of the tax on gross receipts from public utilities. The sources of information are shown on the exhibit itself with the exception of an occasional instance in which the witness verified the data by a later examination of more authentic sources.

The witness stated that students of taxation generally believe that a gross sales tax is divided, some of it being passed on to the consumer and some being borne by the original seller. The witness thereupon introduced Exhibits 20, 21,

22 and 23 which were designed to sustain this point. The introduction of these exhibits was objected to.

[fol. 512] Witness stated that Exhibit 20 was based on a survey of the average prices of commodities sold by the chain stores in Lexington, Kentucky, in the Spring of 1930 and in the Spring of 1933. The prices charged by the various chains were indicated in the form of ratio of the average price charged by the individual chain to the average price charged by all chains.

In 1930 there were five chains recorded as doing business in Lexington, and in 1933 there were three chains. The figures in the second column in each half of the table indicated that in actual practice at the present time the chain stores are selling at prices differing by as much as nearly 10% and differing in each instance by some amount. The same general showing is found by an examination of the right-hand figures except that the differences appearing in 1932 with three chains appeared to be not so large as in 1930 when there were five chains operating.

Asked to explain why there were only three chains in 1932 and five in 1930, the witness stated that the Piggly Wiggly stores had been acquired by The Kroger Grocery & Baking Company. Actually, they were acquired prior to 1930 but at the time the data was collected they appeared to be operating separately and the prices were not the same as between Kroger and Piggly Wiggly stores.

Lexington, according to the United States Census, is a city having a population of 46,000 to 47,000 persons but having something like 15,000 outlying population which was not included in the corporate limits. There was a variation shown in the prices charged by chain stores there.

Exhibit 21 was based on a study of retail prices in Chicago and New York similar to the one conducted in Lexington and the Chicago study conforms in point of time in a considerable part to the Lexington study. The one respecting the situation in New York was made a little bit earlier. Witness stated that the significance that he was attaching to this exhibit was the same as the other exhibit except that it might [fol. 513] be important to observe that even in the highly organized markets, such as Chicago and New York, the same situation existed as in Lexington.

Witness stated that other studies had been made in other parts of the country and he had incorporated the data in

Exhibit 22, which shows that even within the same chain and in the same section of the city the prices vary considerably in higher organized markets such as New York.

The witness then stated that the purpose of the Exhibits 20, 21 and 22 was to show that there are price differentials in actual practice among chain stores engaged in the grocery business. The purpose of Exhibit 23 was to show that chain store official organization believed that the tax would be shifted to the consumer if it was imposed. The exhibit was extracted from an article which was published with editorial comment presumably prepared by the Secretary of the Chain Store Association in approval of the general implications of the article. The author of the article was Robert S. Marx, Cincinnati, Ohio.

Counsel for the plaintiff here noted an objection to the exhibits and particularly to Exhibit 23.

Witness was then asked whether he had anything to add to his other testimony relative to the competitive condition of chain stores as compared with the so-called unit stores or voluntary chain. He replied that he had nothing to add except that the test made in 1933 in the City of Lexington, Kentucky, indicated that the implication from the 1930 survey that voluntary chains were properly considered along with unit stores rather than chain stores was still a proper view to take of the situation. The data in the record showed that the differential in 1930 between the chain charging the highest price and the unit stores charging the lowest price was between 3% and 4%. That appeared to be borne out by the as yet incomplete tabulation of 1933. The voluntary chain or cooperative unit stores came into existence in [fol. 514] comparatively recent years. In Lexington some of the members who formerly operated with the voluntary chains now operate independently and have eliminated their connection with the I. G. A. chain. The witness did not know what has happened over the country generally.

The witness thereupon introduced Exhibit- 1-a, 2-a, 2-b, 4-a and 5-a, supplementing previous Exhibits 1, 2, 4 and 5 which he had introduced at the time his affidavit was drawn. Counsel objected to the introduction of these exhibits as being incompetent and irrelevant.

Witness was asked whether these exhibits tended to sustain the figures given in his former testimony. This was

objected to. The witness replied that the exhibits named referred to the operating expense of certain classes of retail enterprises. Exhibit Martin 1-a refers to the ratio of net gain to net sales from the operation of specialty stores 1930 to 1931 and it is shown in the third column that from 1931 the small stores lost 1.6% and stores of an intermediate size lost on an average of 1.5% and large stores having sales in excess of Two Million Dollars enjoyed a net gain of .9%. Witness stated that the general character of the data presented in Exhibit 1 was similar to the general character of the data presented in Exhibit 1-a, with the exception that the majority of the enterprises lost money in 1931, whereas the majority of them gained in the earlier years, that is, the years 1927-1928 and 1929 reported in Martin Exhibit 1-a.

An examination of the data of 1930 indicates that on the average each of the three classes enjoyed net profits or net gains as the Bureau designated it, the larger the size in general the larger the net gain.

In Exhibit 2-a the data for department stores is given and in 1930 all of them except the smallest group enjoyed net profits, the largest of all enjoying the largest net profit. [fol. 515] In 1931 the smaller stores suffered net losses, the average net loss in the smallest being generally greater than the average net loss of those in the intermediate size and the average of the larger stores enjoyed a net gain for that year.

Witness then stated that the data presented in Exhibit 2-b had become available through the Harvard Bureau of Business Research since Exhibit 2 was prepared and it was presented bodily. Witness stated that an examination two-thirds of the way down the page on Exhibit 2-b under the column headed "percentage of net gain to percentage of net sales" one would discover that all classes lost money in 1932, the group having aggregate sales of less than $150,000 which included 78 concerns, lost 6.7% and those in the next class 5.4% and so on across with for the most part a gradual downward tendency until the group having Twenty Million Dollars or more of sales was reached, in which case the net losses were the lowest to be found in any group reported. Exhibit 4-a contains similar data respecting the ratio of net gain to net worth or the earnings on capital from the operation of specialty stores. It is comparable with the data shown in Exhibit 1-a. This Exhibit indicates

that in 1930 the smaller stores had made profits and the stores of intermediate size have made larger profits and those of the larger size had made larger profits than any group. Whereas, in 1931 stores having sales of less than $500,000.00 suffered losses of 4½%; those from $500,000.00 to $2,000,000.00 of sales suffered losses of 6% and the largest group of all enjoyed profits on invested capital of 1.6%.

The figures in Exhibit 5-a are comparable with those in Exhibit 2-a and show the data for department stores ratio of net gain to net worth. This table shows that the lowest sales group having sales of less than $150,000 suffered losses in 1930 of 3.3% and the other classes enjoyed gains ranging up to 6.4% in cases of stores having sales in excess [fol. 516] of $10,000,000.00. The data in the middle column shows that the losses in 1931 of stores having sales of less than $150,000.00 amounted to an average of 7% and that all of the groups up to the $2,000,000.00 group suffered losses, whereas those having sales in excess of $2,000,000.00 had gains, the larger the enterprise on an average the higher the gain, reaching a maximum of 3.7% on enterprises having sales in excess of $10,000,000.

Exhibit 5-a is supplemented also by Exhibit 2-b. An examination of the column headed "Net Gain Percentage of Net Worth" indicated that in the year 1932 all classes of department stores on an average lost money, the smaller sized stores lost 12.2% and the average ranging down to .8% with those stores having $10,000,000 to $20,000,000 in sales.

[fol. 517] Witness thereupon identified the chart showing relative net profits to sales of variety chain stores for the four year period ending 1932. This was marked Exhibit 24. The introduction of this exhibit was objected to. Witness testified that the exhibit took all of the enterprises reported in Fairchild's Financial Monthly and showed the aggregate net sales for the period of four years as compared with the average net profit for a similar period. The table, the witness stated, showed the exact figures which appeared in the chart which is a part of the exhibit. The data was presented in graphic form with the trend line drawn across the middle of the chart. This trend line is an attempt to show the general relationship in mathematical terms existing between net profits on sales and the volume of sales. It is computed by the so-called method of semi-

averages which involves taking the upper half of the cases, in this case chain of stores, and the lower half, excepting the middle, and drawing the line through the averages thus found. That line is a mathematically constructed trend line and shows that the variety stores selected by Fairchild for reporting in their Financial Monthly indicates that the larger concerns like Woolworth have an average rate of earning higher than the average return of earnings for the smaller enterprises shown at the bottom of the exhibits.

Witness thereupon identified a table which was introduced as Exhibit 25. This exhibit was objected to. He testified: "In Exhibit 25 the data represented in the census of retail distribution with respect to food stores have been copied, certain irrelevant matter being omitted. The statistics representing grocery chains which do not do a meat business are shown in the middle table and the indication is that those having aggregate sales in excess of ten million dollars have an average operating expense of 13.62 to the one hundred dollars of net sales and that the chains having [fol. 518] smaller aggregate sales have a higher operating expense in general. Those with sales of $100,000 have 16.7% of operating expenses or $16.70 per $100.00. The last column shows similar data for those grocery stores also doing a meat business and this column also indicates that the range of 13.6 to 16.88 for the exact percentage. The statistics at the bottom of the page tend to verify the statistics that are introduced at the top of the page and are included for whatever they are worth.

The most interesting thing about the figures respecting the larger stores and the meat sales is the fact that they have in general a substantially lower operating expense than any of the others. Each of them have sales well in excess of ten million dollars and the five million to ten million dollar bracket is exclusive of the three largest.

Witness thereupon introduced a table purporting to show the index of earnings from operations in Kentucky for the year 1929. This table was marked Exhibit 26 and the introduction was objected to.

Witness whereupon testified: The statistics presented in this table as shown by the evidence already in the record have to do with the factors of earning capacity which are important in a retailing business. First, the number of employees necessary to do a given volume of business,

secondly, the inventory turnover which is obviously a factor in the earning capacity of different classes of stores. This exhibit is based on the retail expenses for Kentucky and includes all of the retailers enumerated by the census bureau in Kentucky. It compares with experience of independent retailers with the experience of chain and local branch retailers. The two columns at the end of the table are the significant columns being made to show how these two were computed. These columns show that independent retailers would average or require 14.61 employees to secure annual sales of one hundred thousand dollars, whereas, chain and local branch retailers require 10.01 employees to secure the same volume of trade on an average.

[fol. 519] The last column shows the best index of turnover that is available from the census. It indicates that independent retailers have an average turnover index of 5.67 relative to sales inventory rather than sales to average inventory for the entire year. For the chain and local branch retailers the turnover is 9.48 per year.

Witness was then asked what information he had relative to wages paid by chain stores. This question was objected to as not being relevant to the question in controversy. Witness replied that the information he had was that in retail circles the belief was widespread that chain stores pay relatively lower wages than the independent merchants. Counsel for the plaintiffs moved that the answer be stricken. Witness stated that he received his information from discussion with retailers and partly from "Retailing," which is a trade publication generally recognized in retailing circles as reporting the facts on retailing fairly. Witness thereupon identified and marked as Exhibit 27 an excerpt from an editorial publication in June, 1933. Witness stated that he did not have a copy of the report made by a Federal Bureau on this subject and he only knew of the contents of this report from newspaper comments. Witness thereupon filed a chart or table, which was introduced as Exhibit 28, the introduction of which was objected to and testified that the exhibit was an extract from a page in Bradstreet's publication on chain store earnings dated January, 1933. The publication, witness stated, was a reputable trade publication in the financial field and "Chain Store Earnings" was a reputable publication in the chain store field. There were two separate publications, the witness stated, that had been pasted

together on the same sheet, one being from Bradstreet and the other from "Chain Store Earnings." Witness [fol. 520] thereupon identified a table which was introduced as Exhibit 29 and objected to by counsel for the plaintiff which he stated showed the earnings of The Kroger Grocery & Baking Company on its investment assuming the accuracy of the figures testified to by Mr. Morrill and also assuming the accuracy of the figures in the verified bill of complaint. Witness testified that the first several columns on the table enumerated the factors involved in order to arrive at the net tax shown in the fourth column. The next column showed the net income according to Mr. Morrill's deposition before the sales tax and the following column the income after the sales tax. The next column indicated the investment in Kentucky as shown in the sworn statement submitted to the State Tax Commission in connection with the corporation license tax. The following column indicated the earnings of The Kroger Grocery & Baking Company on that volume of net profit according to the testimony of Mr. Morrill and the second last column indicated the investment in Kentucky adjusted to take care of the reduction in investment which Mr. Morrill indicated in his deposition ought to be made, with the assumption, however, that those adjustments should be allocated to Kentucky in proportion to the sales, which might or might not be a good basis for them as the witness did not know the conditions of the various other Kroger stores. The last column indicates the rate of earnings on investments with that adjustment projected back to 1931 and 1930. The average shown according to the first method of computation is 1.54 and according to the second method is 1.82% for the three years involved in this case.

[fol. 521] Witness thereupon identified and filed Exhibits 8-A, 10-A and 11-A. The introduction of these exhibits was objected to because the exhibits were based upon records and not available to counsel for plaintiff. Witness stated Exhibit 8-A is in the nature of a bringing up to date of Exhibit 8, submitted in 1931. The significant part of the exhibit is shown in the last two columns. It might be assumed in the absence of investigation that the decline in sales which has occurred recently would result in making the operation of these corporations' sales in Kentucky as

compared with their total sales lower than the proportion of property in Kentucky as compared with the total property of the same corporations invested throughout the country. As a matter of fact, the exhibit shows that in every instance these corporations enjoyed a larger proportion of sales in Kentucky than they had of property located in that state. The source for the figures on sales was Moody's Manual of Industrials. Data respecting property invested within and without Kentucky is based on reports filed under the corporation license tax law of the State of Kentucky with the Kentucky State Tax Commission. The reports were prepared and filed by the merchants themselves, these merchants being party to the litigation so far as the witness knew.

Exhibit 10-A, witness testified, showed the ratio of the tax paid by department stores by sales volume. The proportion of gross sales, that is, the ration of sales paid to gross sales for merchants having sales of $150,000 or less and those from $150,000 to $299,000 and those from $300,000 to $499,000 and so on up, including those having sales of over $10,000,000. This is shown for 1930 and 1931. Martin Exhibit 2-B, shows the data for the year 1932 and the general implication of the data is apparent on the face of the exhibit, namely, that the merchants having the smallest volume of sales on the average had the highest ratio of taxes to sales, under the present tax laws. This is true not only for Kentucky but wherever department [fol. 522] stores are located in the United States.

Exhibit 11-A showed that such differences as existed between the department stores operated as a chain and those operated as so-called voluntary chains from those operated independently are minor in character and such differences as do exist are in the group having sales volume of less than $500,000. The exhibit shows that those in ownership group have tax payments equal to .65 of 1% of the net sales, whereas, those not being in a group but being entirely independent have .75 of 1%. Group stores having sales volume of less than $500,000 enjoy an advantage in amount of taxes based on sales over those not in the group. No particular difference is shown for the larger merchants.

Witness then stated that he had made some further investigations of the operations of the Kentucky Gross Sales

Tax Law in order to determine whether or not the actual effect would be to drive merchants out of the business in the event they were unable to shift the tax to their customers. He thereupon filed Martin Exhibit 12-B, which was a table showing the statistics of large retailers doing business throughout the United States, including everyone listed by Mr. Nystrom and also those reported in Moody's Manual of Investments.

Witness was then asked as to whether he had any correction to offer to former exhibits 12, 12-B and 30 and stated he had none except as to Exhibit 12, on which there was a typographical error due to the insertion of a number of businesses reported in the original Exhibit 12. The typographical error showed up as a misnaming of the number of the columns. The correction offered was simply to make Exhibit 12 read as it was prepared to read. The correction was thereupon introduced and marked correction of exhibit 12. Witness then stated that Exhibit 12-B shows for all those merchants included in Mr. Nystrom's list, [fol. 523] whose records are available in Moody's, the operating experience in terms of the volume of net sales, the net profit after taxes, the net profits which would have been made after the deduction of 1% flat sales tax, the net worth, the ratio of the net profit to the net worth and the ratio of net profit that would have been made after the deduction of such tax to the net worth, assuming all along that the tax would not have effected the sales and that the sales volume would have continued. The right hand side of the table shows the situation which would have existed if those merchants had operated in Kentucky to the extent of 5% of their total business. That 5% is an arbitrary figure and was suggested by the fact that that is roughly the proportion of business which the Kroger Company does in Kentucky as compared with its total business. The essentials of the table are shown in the summary at the bottom of the page and the most essential parts are shown in columns 10 and 12. Column 10 shows the rate of earnings which those merchants would have enjoyed in Kentucky under the circumstances described without the gross sales tax or any gross sales tax, and Column 12 shows the net earnings on the net worth of the corporation which these merchants would have enjoyed after the application of the sales tax. The range of the new volume of busi-

ness done by each of these corporations is shown by the first column of this summary, and in brief, the two columns designated indicate that the largest class of merchants would have enjoyed in 1932 9.4% on their investments as evidenced by net worth and that that would have dropped in the next largest sales group to 2.53% and in the third largest or the next to the smallest 1.61% and in the lowest group to a loss of 5.73%. The last column shows that after the application of the sales tax as to Kentucky business the range of profit would have been from 6.54% for the largest group down to a loss of 5.79%. The greatest alteration would have been in the group having the highest sales but [fol. 524] that group would still enjoy a substantial profit making differential over the other merchants.

Counsel for plaintiff thereupon objected and moved that the answer be stricken for the reason that it was incompetent and irrelevant and for the further reason that it was not responsive to anything set forth in Mr. Nystrom's affidavit or in any exhibit therein referred to because Mr. Nystrom's affidavit does not deal with sales for the year 1932 at all. Counsel further objected because the answer was predicated upon statistics purported to have been made from Moody's Manual of Industrials for the year 1932 and the sources from which these figures are taken are not made available to counsel in order that they might cross-examine on the exhibit or the correctness of his report as to the digest as to what is contained in Moody's Manual of Industrials. Counsel objected for the further reason that the statement was entirely hearsay even if based upon Moody's Manual of Industrials.

Witness stated that Moody's Manual of Industrials was available in any reputable library and in most investment offices and stock brokers' offices.

Counsel for plaintiff further objected because Exhibit Martin 12-B was predicated upon the assumption that 5% of Kroger's sales are made in the State of Kentucky and upon the further assumption that all of the other companies referred to in Exhibit 12-B do the same proportion of their business in the State of Kentucky, which assumption is wholly without foundation in the evidence or in any document which is exhibited or referred to by the witness.

Witness was of the opinion that the situation in Kentucky would not be materially different as regards taxation, operating conditions, such as rent, costs of labor, etc., stability of business conditions, competition, which would render it a better or worse market in those communities in which large scale merchandising is carried on than the markets in similar communities to be found on the average in the other states. There would be minor advantages in Kentucky and minor disadvantages in that State which would practically offset each other.

[fol. 525] Witness thereupon produced and filed Exhibit 18 which he stated was a table showing or comparing Kroger's taxes in Kentucky with those that the company would pay if it operated in other states with the same gross sales. Witness stated that the table applied to the following states: Minnesota, Vermont, New Mexico and other states having gross sales taxes somewhat similar to those in Kentucky. The table did not apply to Louisiana.

Witness thereupon filed Exhibit 31, the introduction of which was objected to as was the introduction of Exhibit 18. This exhibit, the witness stated, summarized evidence he had offered and included data which had been omitted. The witness stated that this part of the report was based on the implication that the taxes were wholly taken out of earnings but the witness was of the opinion that taxes would not be taken wholly out of earnings. The exhibit was also based on the supposition that the tax would be paid wholly by the company and would not be passed on to the consumer. Witness thereupon continued his explanation of Exhibit 31 by stating that it was made up of a table showing the method of computing the data given with the exception of the tax data. The exhibit also consists of a chart which shows in graphic form the relationship of the effective tax rates described in the gross sales tax act on the one hand and the earnings of the three classes of merchants on the other. The first part of the graph is a large scale chart to show completely the grocery chains, which have in some instances large volumes of sales, so that other information may be compared with data effecting the Kroger Grocery & Baking Company which are also shown on the chart. The lower part of the chart shows the effective tax rate without taking account of the credits in any instances on the earnings of grocery chains as compared by the Harvard Bureau of Business Research and on the

average earnings of department stores from 1927 to 1932, inclusive, being all the years for which the Harvard Bureau has reported complete data. It also shows the same [fol. 526] thing on the earnings of variety stores as reported by the Harvard Bureau. Since the Harvard Statistics do not give a class which included all of the larger grocery chains, a computation outlined at the top of the page was made in order to get other chains comparable with Kroger. This computation includes all of the chain grocery stores reported in Moody's Manual of Industrials. The number of those chains is much smaller than the number reported to the Harvard Bureau.

The interesting thing about the chart is the similarity between the graph indicating the effective tax rate without taking account of credit for other taxes and the graph reporting the earnings of those corporations.

The five chief grocery chains, The Great Atlantic & Pacific Tea Company, The First National Stores, the American Stores, The National Tea Company and Safeway Stores, Inc., had average earnings for 1930 of 2.85%; for 1931 it was 2.92% and for 1932 it was 2.66%, as reported by Moody's Manual of Industrials. Mr. Morrill in his testimony listed these five, apparently as an after thought three others. If the entire eight corporations were included the earnings on sales for 1930 would have been 2.82%; for 1931, 2.92%, and for 1932, 2.67%. That is weighted average, the weighting being based on volume of sales in each case. That is compared with the data for grocery chains as is shown in Exhibit Martin 31, which gives almost exactly the same result. The main reason for that is that Mr. Morrill included very largely the same group stores we included in getting up the data for this chart. The exact comparison may be had by relating the figures just given from Mr. Morrill's group and the figures shown at the upper right hand corner of the table which was filed.

[fol. 527] Cross-examination of Professor Martin

Witness is a professor of economics and director of the Bureau of Business Research of the University of Kentucky, having held that position since September, 1928. Prior to that time he was professor in Emory University. Immediately prior to that he was a summer school teacher at Peabody College for Teachers and before that he was a

graduate student and student instructor in the University of Chicago. He taught at Peabody in the summer of 1924.

He had no practical experience, conducting any retail business either in Kentucky or elsewhere. He had been engaged in teaching since he took his graduate course at the University of Chicago in 1924 and had never conducted any merchandising business, either wholesale or retail. He had also been engaged in research work. This is particularly so since the time he came to the University of Kentucky. The research dealt chiefly with particular problem on which he is now working. The Bureau of Business Research in the University of Kentucky was founded by administrative action in February, 1928. The witness had been connected with it throughout its history. He had associated with him at various times different members of the teaching staff of the University of Kentucky and also students working for their doctors' degree at the University. These numbered from two to four in the course of years. Any work done in the Bureau was done under the personal supervision of the witness, and generally in accordance with plans laid down by him for the conduct of research. He specified the objects to be examined and the extent of the research. The Bureau undertakes problems at the request of the University administration.

Witness stated that he was head of the Bureau but it was not correct to say that in effect he was the Bureau of Business Research because he had associated with him several others who also took part, as for example, the tabulating work was done by others. He personally worked the [fol. 528] matter up. Witness stated that other than matter taken from other people's survey, he was in effect and substance quoting himself as authority. This was done solely for convenience to prevent cluttering up of the records, with all the reports of the bureau, foreign and domestic statutes, etc. Witness was of the opinion that he had referred to these reports in every instance in his exhibit.

Witness testified on behalf of the State in other tax cases, among these being the so-called "Oleomargarine Tax Case". He testified in this case at the request of Assistant Attorney General Brown. The first case he testified in was a rate case brought by the Interstate Commerce Commission. This took place in 1928 or 1929. The style of the

case was the Commonwealth of Kentucky vs. Ahnepee and Western Railroad Company and others. He also testified in connection with the condemnation of Mammoth Cave, the so-called new entrance to Mammoth Cave and the Great Onyx Cave. In that case he testified as a valuation witness and appraiser. He also prepared himself to testify as a witness for the attorney general in the condemnation suit to acquire Cumberland Falls. In this case the question involved was to ascertain the amount of flow of water over Cumberland Falls in the area that would be inundated by the dam, and also the value of the water rights required for the development of the water power. The evidence which he contemplated giving in that case was of an economic nature and not of an engineering nature. It would have related to the valuation of the area and rights involved.

The witness did not appear before any committee of the legislature at the time the gross sales tax law prepared for the 1930 session was under consideration, nor did he present any ideas or any of the information which he has developed for the purpose of this suit to the legislature. He did not know whether such information was submitted or not. No member of the Bureau of Business Research appeared before any committee, nor were they called before the legislature to testify regarding the law which was afterwards passed.

Witness stated that he had made a personal investigation of the tax situation in Kentucky and had made a general investigation of the tax situation in other States on this question, and that he was testifying from the data which he had gathered in such investigation.

[fol. 529] Witness stated that he confined his consideration of the act largely to an analysis of chain stores and department stores. He also considered other stores doing a large scale of retailing and he also considered individually owned stores. In connection with the data respecting average prices of retail stores in Lexington, Ky., a survey was made under his own general supervision and under the more direct supervision of his colleague, Professor Palmer. The results of a similar survey by Professor Palmer, made in 1933, are not yet completely tabulated. The information was secured directly from the merchants. This survey was local for Lexington.

Witness stated that he had obtained this data representing those stores which do business in Kentucky from the returns made by the stores themselves to the State Tax Commission under the Corporation License Tax and that the data was therefore accurate.

The witness' attention was then called to Bulletin 78 of the Bureau of Business Research of Harvard University and particularly to page one of that bulletin, which showed the location of cooperating firms. Witness examined this table and stated that of the eighty concerns only one firm from Kentucky having sales over a million dollars made reports and only four firms with sales under one million dollars from Kentucky reported to the Bureau. All of these concerns were department stores. Witness stated that these were the figures for 1928, but in various years the number varied. The bulletin listed 251 department stores having net sales of less than one million dollars of which only four were located in Kentucky. It listed 162 department stores with net sales of over one million dollars of which only one is located in Kentucky. With regard to specialty stores, there is no reference to any doing business in Kentucky. Harvard Bulletin No. 83 issued by the Bureau of Business Research of that University contains 527 department stores, of which only 6 are located in Kentucky. It also contains 85 specialty stores, of which only one is located in that State. Report No. 85 of the Bureau indicates that the material came from firms located in all parts of the United States, Hawaii and Canada. The same was true with regard to Bulletin 88 for the year 1931. Witness stated that he had investigated the tax situation as it existed in other states and countries and he makes a tabulation of the facts regarding taxation in [fol. 530] each of the various states that comes under his observation.

Witness went on to testify that the tax rate is found only after credits are taken into consideration. In order to determine what tax any merchant pays under this act, the credits to which that merchant is entitled must be determined. The best way of finding out the distribution of the tax insofar as those who have paid is concerned, would be to examine the returns of the State Tax Commission and the best way of determining just how the law works and exactly the burden it imposes upon the taxpayers

under its provisions, would be by examination of the tax returns of those who have made returns. Such an examination would be better than any theory.

The laws of Minnesota, New Mexico and Vermont became effective during the current calendar year and the witness had no access to any reports showing the exact workings of those laws. As far as witness knows, litigation concerning the validity of these laws had been instituted in New Mexico.

A store in a given town having gross sales of $50,000 to $400,000, paying a tax and coming into competition with a store owned by another individual who does not have to pay a tax, can shift the tax to consumer in large part. The reason for it is that price is not the sole advantage. People trade with stores from habit and for other reasons. A great deal depends upon the accommodations extended by the manager of any store in order that customers may be held. The impression of affability that customers get from the employees also enters as a factor in keeping business. Where all competitors pay the same tax on a similar volume of business it is much easier to shift the tax.

The fifteenth census of the United States as to retail operations referred to in Martin Exhibit No. 25, has only recently been published. It deals with the calendar year 1929. That year was abnormal in some respects insofar as business is concerned.

[fol. 531] Exhibit 12-A was prepared to show what various corporations would do if they had a business which was proportionately as large in Kentucky as that of Kroger's. Some of these businesses however did not do any business in the State.

Witness stated that Exhibit 26 entitled Some Indexes of the Relative Earning Power of Retailers in Kentucky by Types of Operation in 1929, which purports to be computed from the 15th census of the United States, had just recently been published, and that exhibit dealt with Kentucky cases. That in preparing the exhibit the witness had allocated to the store owner and members of his family wages for the purpose of determining the earning power of the store.

[fol. 532] MARTIN EXHIBIT XVII

Maximum Gross Sales Tax Rates Imposed on Retailers in Various States and Foreign Countries*

Jurisdiction	Rate	Jurisdiction	Rate
Connecticut	0.1%	Australia	2.5%
Delaware	0.1	Austria	10.0
Indiana	1.0	Belgium	10.0
Kentucky	1.0	Bolivia	0.5
Minnesota	1.0	Brazil	2.0
Mississippi	2.0	Cuba	10.0
New Mexico	2.5	Czecho-Slovakia	12.0
New York	1.0	Equador	1.0
North Carolina	3.0	France	13.0
North Dakota	2.0	Germany	.75
Oregon	2.0	Italy	3.0
Pennsylvania	0.1	Poland	2.25
South Dakota	1.0	Phillipine Islands	1.5
Utah	5.0	Porto Rico	2.0
Vermont	4.0	Roumania	10.0
Washington	3.0	Russia	6.0
West Virginia	1.0	Turkey	6.0

* Based on statutes so far as commonwealths of the United States are concerned except New Mexico (Commerce Clearing House Tax Service) and North Carolina (newspaper comment). The data for foreign countries and U. S. territories were gathered under my supervision a year ago and reflect the situation as of the winter of 1931–32. The sources are cited in "The Gross Sales Tax in Kentucky," published by the Bureau of Business Research, University of Kentucky.

[fol. 533] MARTIN EXHIBIT XVIII

Effective Tax Rates on Gross Sales in Kentucky Compared with Those in Other States Having Graduated Retail Sales Taxes *a*

	Total gross sales	Amount of tax	Effective tax rate
Kentucky *b*	$50,000	$25.00	.0500%
	100,000	50.00	.0500
	200,000	100.00	.0500
	400,000	200.00	.0500
	600,000	550.00	.0917
	800,000	1,500.00	.1875
	1,000,000	3,050.00	.3050
	2,000,000	13,050.00	.6525
	3,000,000	23,050.00	.7683
	4,000,000	33,050.00	.8263
	5,000,000	43,050.00	.8610
	6,000,000	53,050.00	.8842
	7,000,000	63,050.00	.9007
	8,000,000	73,050.00	.9131
	9,000,000	83,050.00	.9228
	10,000,000	93,050.00	.9305

a In these computations deductions, credits, and offsets provided in Kentucky and other states are ignored. The data for Minnesota reflect total taxes levied under both schedules provided in the Act. It is assumed that average annual sales are $50,000 a store and the maximum $100,000.

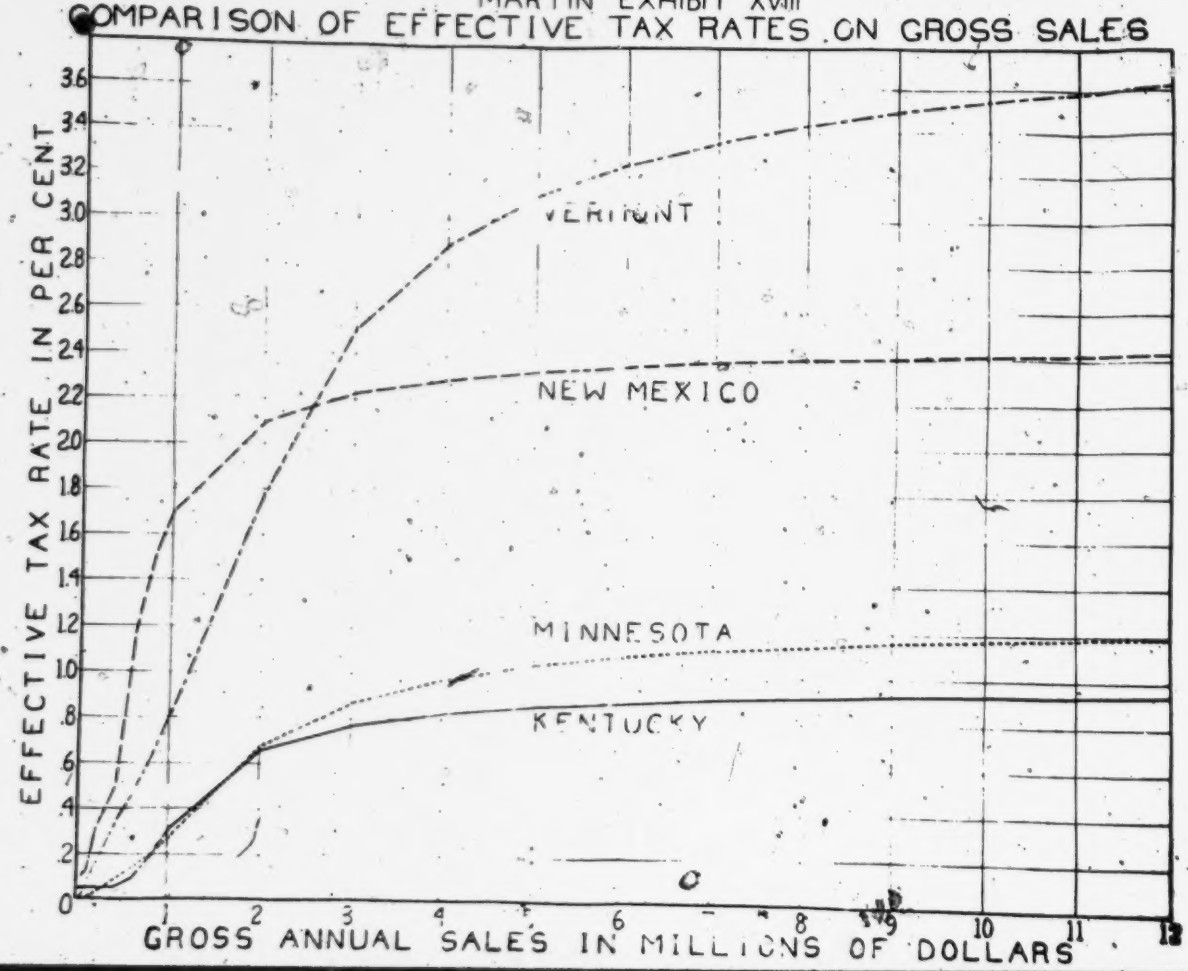
b Ky. Acts, 1930, chap. 149.

	Total gross sales	Amount of tax	Effective tax rate
	11,000,000	103,050.00	.9368
	12,000,000	113,050.00	.9421
Minnesota *c*	50,000	0	0
	100,000	0	0
	200,000	60.00	.0300
	400,000	330.00	.0825
	600,000	810.00	.1350
	800,000	1,570.00	.1963
	1,000,000	2,730.00	.2730
	2,000,000	13,430.00	.6715
	3,000,000	25,940.00	.8647
	4,000,000	39,040.00	.9760
	5,000,000	52,140.00	1.0428
	6,000,000	65,240.00	1.0873
	7,000,000	78,340.00	1.1191
	8,000,000	91,440.00	1.1430
	9,000,000	104,540.00	1.1616
	10,000,000	117,640.00	1.1764
	11,000,000	130,740.00	1.1885
	12,000,000	143,840.00	1.1987
New Mexico *d*	50,000	50.00	.1000
	100,000	125.00	.1250
	200,000	650.00	.3250
	400,000	1,950.00	.4875
	600,000	6,950.00	1.1583
	800,000	11,950.00	1.4938
	1,000,000	16,950.00	1.6950
	2,000,000	41,950.00	2.0975
	3,000,000	66,950.00	2.2317
	4,000,000	91,950.00	2.2988
	5,000,000	116,950.00	2.3390
	6,000,000	141,950.00	2.3658
	7,000,000	166,950.00	2.3850
	8,000,000	191,950.00	2.3994
	9,000,000	216,950.00	2.4106
	10,000,000	241,950.00	2.4195
	11,000,000	266,950.00	2.4268
	12,000,000	291,950.00	2.4329
Vermont *e*	50,000	0	0
	100,000	62.50	.0625
	200,000	312.50	.1563
	400,000	1,312.50	.3281
	600,000	2,812.50	.4688
	800,000	5,062.50	.6328
	1,000,000	8,062.50	.8063
	2,000,000	35,562.50	1.7781
	3,000,000	75,562.50	2.5188
	4,000,000	115,562.50	2.8891
	5,000,000	155,562.50	3.1113
	6,000,000	195,562.50	3.2594
	7,000,000	235,562.50	3.3652
	8,000,000	275,562.50	3.4445
	9,000,000	315,562.50	3.5063
	10,000,000	355,562.50	3.5556
	11,000,000	395,562.50	3.5960
	12,000,000	435,562.50	3.6297

c Session Laws, 1933, chap. 213.
d Laws, 1933, chap. 73.
e Act approved March 25, 1933.

(Here follow photolithographs of Martin Exhibit XVIII, side folios 534 and 535)

MARTIN EXHIBIT XVIII



534

348A

NET GAIN: PERCENTAGE OF NET WORTH
0
2
4
6
8
10
12
SALES: MILLIONS OF DOLLARS
1
2
3
4
5
6
THIRD QUARTILE
AVERAGE
FIRST QUARTILE

[fol. 536] MARTIN EXHIBIT XX

Average Prices in Chain Stores in Lexington, Kentucky, Spring 1930 and Spring 1933 *a*

Chain store system	Ratio of average prices to average of all chains, 1930	Chain store system	Ratio of average prices to average of all chains, 1933
A	95.1%	F	98.5%
B	97.1	G	99.3
C	99.9	H	102.2
D	103.0		
E	104.6		

a Based on surveys of chain and independent store prices made in the College of Commerce, University of Kentucky. The 1933 figures will be checked again before final publication, though each computation has already been made twice.

[fol. 537] MARTIN EXHIBIT XXI

Comparison of Chain Store Prices in Chicago and New York to Ascertain Degree of Variation Between Chains

	Price variations	
	Chain	Ratio of average price to lowest chain average in city
New York *a*	A	100.7
	B	101.4
	C	102.5
	D	101.9
	E	100.0
	F	103.9
	G	106.9
	H	103.2
	I	102.5
Chicago *b*	J	100.0
	K	100.0
	L	103.0
	M	101.6

a Computed from R. S. Alexander, "A Study in Retail Grocery Prices," Journal of Commerce (reprint).

b Computed from E. Bjorklund and J. L. Palmer, "A Study of Prices of Chain and Independent Grocers in Chicago," Studies in Business Administration, University of Chicago.

[fol. 538]

MARTIN EXHIBIT XXII

Price Variations Between Different Units of Same Chain a

Columns A—Number of products on which different prices were quoted.
Columns B—Average price difference as percentage of average price of products.

	Chain No. 1		Chain No. 2		Chain No. 3		Chain No. 4		Chain No. 5		Chain No. 6		Chain No. 7	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Westchester	19	13.69	7	12.98	..	.....	..	.....	..	.....	..	.....	..	.....
Madison Avenue	24	12.03	13	13.68	20	12.38	21	16.89	..	.....	..	.....	..	.....
Broadway	19	9.84	16	15.29	..	.....	..	.....	11	17.12	..	.....	..	.....
Hempstead	..	.....	16	11.87	..	.....	..	.....	..	.....	..	.....	..	.....
Leonia	..	.....	..	.....	..	.....	..	.....	..	.....	12	15.90	..	.....
Bergenfield-Dumont	..	.....	..	.....	..	.....	16	12.17	..	.....	..	.....	10	10.42

a Dorothy Dowe, "A Comparison of Independent and Chain Store Prices," The Journal of Business, University of Chicago, April, 1932.

[fol. 539] MARTIN EXHIBIT XXIII

Chain Taxes Will React on Consumers *

* * * * * * *

"Let us expand the illustration. Assume that the legislature steps in, and for the purpose of punishing the chain store for its efficiency, and for having reduced the cost of living to the consumer, levies a tax on the chain store—what is the net result? The obvious answer is that the tax must be added to costs, and costs and interest must be paid by the consumer. Who is the consumer?

"The consumer who patronizes the chain store is ordinarily a customer who is required to measure expenditures carefully, and to buy where he or she gets the best goods for the least money. In the final analysis, when the legislature taxes a chain store, it is taxing the consumer, i. e., the working men and women of the state—the men and women who can least afford to pay the tax. It is levying a tax upon the necessities of life—food, clothing and drugs—and increasing indirectly the cost of living to the American people. Instead of chain store taxation, it is food taxation. The levying of taxes on food and clothing is repugnant to the whole principle upon which taxation has been based in the United States."

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* Chain Store Progress, August 1931, p. 3.

[fol. 540] MARTIN EXHIBIT No. 1-A

Ration of Net Gain to Net Sales from Operation of Specialty Stores, 1930–31 *

Net sales	1931		1930	
	Number of stores	Ratio	Number of stores	Ratio
$500,000 or less	30	L 1.6%	37	0.5%
500,000–2,000,000	22	L 1.5	29	1.8
2,000,000 or over	18	0.8	19	2.2

* As reported in Bulletin 88, Bureau of Business Research, Harvard University.

[fol. 541] MARTIN EXHIBIT 2-A

Ratio of Net Gain to Sales, Department Stores, 1930–31*

Net Sales	1931 Number Stores	1931 Ratio	1930 Number Stores	1930 Ratio
Less than $150,000.....	65	L 4.7%	76	L 2.0%
150,000– 300,000..	64	L 3.4	88	0.2
300,000– 500,000..	58	L 1.8	81	0.5
500,000– 750,000..	51	L 1.5	58	1.3
750,000– 1,000,000..	27	L 2.3	35	0.1
1,000,000– 2,000,000..	65	L 0.4	75	1.2
2,000,000– 4,000,000..	50	0.4	67	2.7
4,000,000–10,000,000..	44	1.2	54	2.5
10,000,000 and over....	27	1.9	30	3.3

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

(Here follows table, side folio 542.)

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Table 2. Operating Results o

(Common Figures;

Items	Less than $150	$150–300
Number of Reports	78	70
Aggregate Sales (in millions)	$7	$17
Typical Net Sales (in thousands)	$80	$210
Index of Change in Sales (1932/1931)	74.8	74.5
Population of City (in thousands)	10	25
Total Merchandise Costs (Net)	73.9%	72.8%
Gross Margin	26.1	27.2
Total Pay Roll	19.3%	18.4%
Real Estate Costs	4.6	4.6
Newspaper Advertising	*	2.1
Direct Advertising	*	0.2†
Other Advertising	*	0.3†
Total Advertising (subtotal)	2.5	(2.6)
Taxes (except on real estate and income)	0.8	0.75
Interest (except on real estate)	3.4	3.1
Supplies	0.85	1.05
Service Purchased	1.15	1.25
Unclassified: Losses from Bad Debts	0.4	0.55
Other	0.75	0.6
Travelling	0.3	0.35
Communication	0.45	0.55
Repairs	0.15†	0.2
Insurance (except on real estate)	0.7	0.6
Depreciation (except on real estate)	0.9	1.0
Professional Services (See Appendix, page 56)	0.15†	0.3†
Total Expense	36.4%	35.9%
Net Profit or Loss	L.10.3%	L. 8.7%
Net Other Income (including interest on capital owned)	3.6	3.3
Net Gain:		
Percentage of Net Sales	L. 6.7%	L. 5.4%
Percentage of Net Worth	L.12.2	L. 9.0
Rate of stock-turn (times a year):		
Based on Beginning and Ending Inventories	2.0	2.5
Returns and Allowances	2.0%†	5.0%†
Initial Mark-up (percentage of original retail value):		
On Net Cost Delivered	35.2	37.2
Mark-downs	*	*
Discounts to Employees and Others	*	*
Stock Shortages (total for year)	*	*
Total Retail Reductions	13.5%†	15.0%†
Sales per Square Foot of Total Space	$8.00†	$9.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†
Sales/Total Employees	$5,700†	$6,000†
% Cash and C. O. D. Sales	62.0%†	55.0%†
% Charge and Instalment	38.0†	45.0†
% of Firms Earning Some Net Profit	6.4%	0.0%
% of Firms Earning Some Net Gain	11.5	11.4

* Data not available.

† Figures for this item were given on less than 75% of the reports used.

MARTIN EXHIBIT 2-B

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%; except where noted)

Items	Sales volume groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Reports	78	70	45	33	24	65	45	47	15	6
ales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
ange in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.50
f City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,50
andise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
n	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
oll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Costs	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	5.8	7.7
Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
rtising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
tising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
tising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
t on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
ept on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
hased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
tion	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
xcept on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
n (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
se	36.4%	35.9%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
or Loss	L.10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 4.9%	L. 4.7%
Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
e of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
e of Net Worth	L.12.2	L. 9.0	L. 5.0	L.10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	
k-turn (times a year):										
Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
-up (percentage of original retail value):										
ost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
ages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
uare Foot of Total Space	$8.00†	$9.00†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	50.25%†	46.5%†	48.4%	46.7%	48.5%	56.3%
nd Instalment	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
Earning Some Net Profit	6.4%	0.0%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

st available.
es for this item were given on less than 75% of the reports used.

[fol. 543] MARTIN EXHIBIT No. 4-A

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $500,000	30	L 4.5	37	3.1%
500,000–2,000,000	22	L 6.0	29	6.3
2,000,000 and over	18	1.6	19	7.4

* As reported in Bulletin 88, Bureau of Business Research, Harvard University.

[fol. 544] MARTIN EXHIBIT No. 5-A

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent —1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	L 7.0%	76	L 3.3%
150,000– 299,000	64	L 8.0	88	0.1
300,000– 499,000	58	L 3.0	81	1.5
500,000– 749,000	51	L 3.5	58	2.3
750,000– 999,000	27	L 4.0	35	0.6
1,000,000–1,999,000	65	L 0.9	75	3.2
2,000,000–3,999,000	50	0.7	67	4.5
4,000,000–9,999,000	44	2.5	54	4.6
10,000,000 and over	27	3.7	30	6.4

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 545] MARTIN EXHIBIT XXIV

Relation of Net Profit to Net Sales of Variety Chain Stores for Four-Year Period Ending 1932 *a*

Variety chain	Aggregate net sales (4 years)	Aggregate net profit (4 years)	Rate of profit on sales	Semi-averages, middle case omitted
Woolworth (F. W.) Co.	$1,124,898,214	$133,850,302 *b*	11.90%	
Penny (J. C.) Co.	731,611,257	34,700,237	4.74	
Kresge (S. S.) Co.	567,339,516	40,691,779	7.17	8.05%
Grant (W. T.) Co.	286,044,965	11,101,320	3.88	
Kress (S. H.) & Co.	269,576,969	19,621,635	7.28	
McCrory Stores Corp.	170,893,923	5,384,771	3.15	
Newberry (J. J.) Co.	122,245,233	5,796,182	4.74	
McLellan Stores Co. *c*	89,646,579	2,910,283	3.25	
Murphy (G. C.) Co.	70,995,049	3,070,023	4.32	3.81
Neisner Brothers, Inc.	61,987,192	1,308,143	2.11	
Fishman (M. H.) Co., Inc.	9,588,987	435,582	4.54	

a Computed from data reported in Fairchild's Financial Manual, sixth edition. All cases reported are included in this analysis except Rose's 5, 10 & 25¢ Stores, Inc., which has been omitted because data were incomplete. All figures are for calendar years except those for W. T. Grant Co. which are for the four-year period ending January 31, 1933.

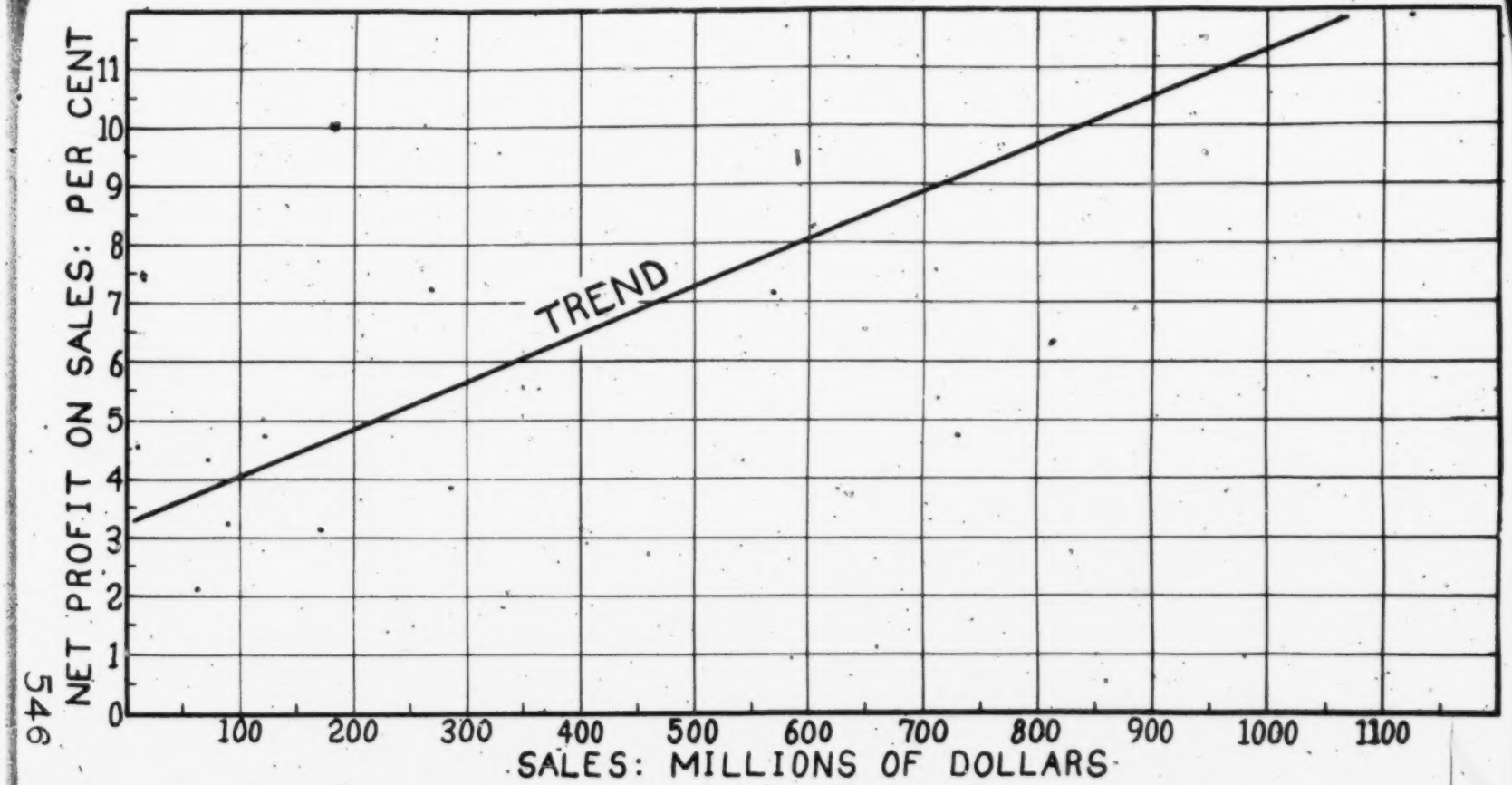
b Includes $9,977,452 profit on sale of securities in 1931.

c Figures for four years ending 1931 last reported.

(Here follows photolithograph of Martin Exhibit XXIV, side folio 546.)

MARTIN EXHIBIT XXIV

RELATION OF NET PROFITS TO NET SALES OF VARIETY STORES FOR FOUR-YEAR PERIOD ENDING 1932



[fol. 547] MARTIN EXHIBIT XXV

Store Operating Expenses of Food Chains Classified by Sizes *a*

Sales	Grocery		Grocery and meat	
	No. of chains	Expense per $100 of sales	No. of chains	Expense per $100 of sales
Three largest	..	.....	3	$13.60
Others with more than $10,000,000	11	$13.62	13	15.07
$5,000,000–$10,000,000	4	13.42	17	16.41
2,500,000– 5,000,000	13	14.82	15	17.14
1,000,000– 2,500,000	30	15.03	57	15.46
500,000– 1,000,000	61	13.40	88	14.62
250,000– 500,000	70	13.34	144	15.37
100,000– 250,000	83	14.28	110	15.59
Less than 100,000	41	16.70	28	16.88
Number of units				
Three largest *b*	..	.....	3	13.60
Others with over 1,000 units	20	13.70	4	14.69
101 to 1,000 units	..	.....	25	14.99
26 to 100 units	39	14.13	28	17.40
Less than 26 units	254	14.16	415	16.42

a Fifteenth Census of the United States, Retail Distribution; Retail Chains.
b The store operating expense of the three largest food chains, averaging $13.60 a $100 of sales, may be compared with $15.46 for all other chains.

[fol. 548] MARTIN EXHIBIT XXVI

Some Indexes of Relative Earning Power of Retailers in Kentucky by Types of Operation, 1929*a*

	Number of stores	Number of employees *b*	Total sales	Number of employees per $100,000 of sales	Sales inventory at end of year
Independent retailers	19,767	59,660	$408,226,139	14.61	5.67
Chain and local branch retailers	1,677	8,739	87,316,987	10.01	9.48

a Computed from Fifteenth Census of the United States, Retail Distribution: Kentucky, Table 5–A.
b Includes proprietors and assumes part time = half time.

[fol. 549] MARTIN EXHIBIT XXVII

Chain Store Wages [a]

* * * * * * *

"It is no secret that one of the great advantages of the chains was due to the fact that they paid lower wages than

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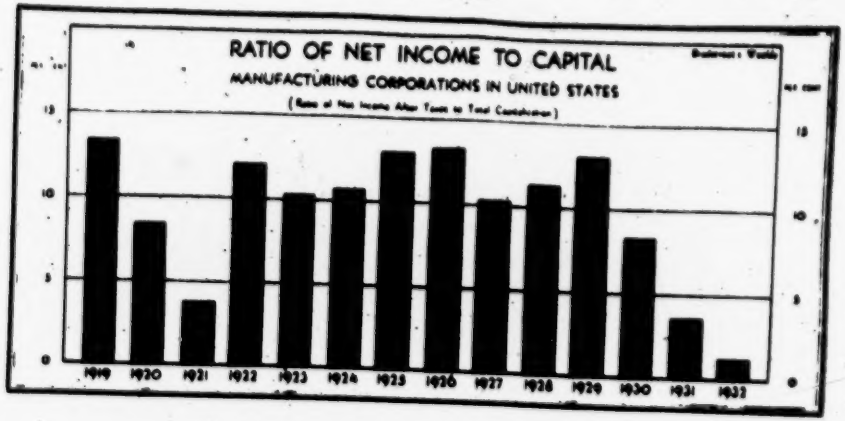
[a] Editorial, *Retailing*, June 19, 1933.

the bigger independents, especially the department stores. Selling behind the counter of a chain store was simpler, it is true, and more mechanical. But the fact remains that the wages are generally below the average for other kinds of stores."

(Here follows photolithograph of Martin Exhibit XXVIII, side folio 550.)

MARTIN EXHIBIT
XXVIII

POST-WAR RECORD OF CORPORATE EARNING



January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO

CHAIN store reports of operations for 1932, which will shortly begin to make their appearance, are expected to furnish

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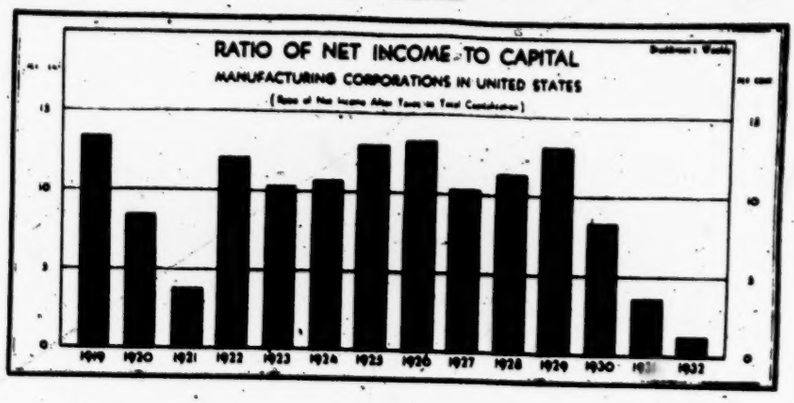


January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO

CHAIN store reports of operations for 1932, which will shortly begin to make their appearance, are expected to furnish pleasant reading. Despite the further drop in retail prices and contraction of public buying power which contributed greatly to restrict dollar sales, the chain store business as a whole will record a highly satisfactory earnings mark, quite unlike the showing of most other major branches of industry.

From present indications, it appears that among the companies covered by the Chain Store Act sales index the grocery chains as a group again will make relatively the best showing from the standpoint of total earnings and ratio of net to sales. This showing, furthermore, will be accomplished in the face of heavy expenditures made during the year in remodeling and consolidating a large percentage of stores. The five and ten and drug groups are expected to make a close bid for second place, while the shoe and apparel groups will probably compete in the order named.

The accompanying table presents the aggregate estimated sales and profits for 1932 for each group, together with comparative figures for 1931. The estimated results are based on the assumption that December sales will at least maintain the rate of comparison with 1931 as was shown by volume for the first 11 months.

On the basis of these estimates, aggregate net profits in 1932 for the group of 18 grocery chains will be about 24% less than 1931. The ratio of net to sales, however, will remain unchanged at 2.7%, a truly remarkable achievement considering the conditions which existed.

Total estimated profits for the five and ten group will be roughly 27% under the 1931 total, while the profit ratio will show a decline from 7.4% to about 6.0% for all six companies taken as a unit.

Two drug chains will probably fare better than the five and ten group, though the smaller number of units in the drug group does not afford as weighty an index as is the case with the five and ten chains. At any rate, the combined earnings of the drug chains are estimated roughly at 21% under the 1931 results. The profit ratio, however, will witness only a slight decline, or from 3.7% to about 3.3% on sales.

Estimated earnings for two shoe chains in 1932 indicate a decline of about 35% under the 1931 total on this basis, the profit margin will be about 2.8% on sales, as against 3.6% in the preceding year.

Data on the apparel groups is sufficient to permit even an estimate of probable results, but it is doubtful whether any sizable profit will be shown for the year. More likely, the combined showing will show a net loss. In 1931, on a total business of nearly $80,000,000, the four chains in this classification obtained a combined net profit of only $678,000.

Aside from this satisfactory display of earning power, nearly all of the chain store companies above covered, regardless of type, are expected to present a financial standing at the close of the year which will compare favorably with previous years. Preliminary information at hand indicates, in most instances, the maintenance of a continued healthy cash position and either complete freedom from bank debt, or a substantial reduction of such obligations.

All in all, it may be stated with a fair degree of accuracy that the chain stores, for the most part, will commence business in 1933 in practically the same strong financial shape as a year ago, a condition which carries an encouraging augury for operations in the new year.

Whenever a business consistently shows a large and relatively well sustained earning power year after year it is only natural to attribute the success to capable management. It cannot be denied that this factor was largely responsible for the continued progress of the retail organizations.

But, without intending to minimize the important part played by good management, the satisfactory results of the chains last year was due in no small part to the excellent cooperation obtained from landlords who instead of attempting to hold successful companies to rent obligations contracted for on bases patently made burdensome by existing conditions have regarded the chains in their true light of steady and well-paying tenants.

Instead of adopting an obstinate attitude on the matter of rent relief these property owners have seen the benefits which would ultimately accrue to all concerned from a satisfactory adjustment of rentals. The chains have cut every controllable item of expense, in some instances rather drastically. It remains for all landlords to contribute their share and aid in preserving intact an industry which, in the final analyses, has brought and will continue to bring them abundant returns.

Safeway Earnings Estimated

IN connection with the recent reduction in the quarterly dividend on Safeway stores, Inc., common stock, it has been learned that, although final results for 1932 will not be known for another month or two, the company should show net earnings for the year in the neighborhood of $5,000,000. This would compare with $5,415,941 earned in the year 1931.

The company is reported to be entirely free of bank debt. Current working conditions remain sound, with cash probably in excess of the $9,611,656 on hand at the end of last

[fol. 551]

MARTIN EXHIBIT XXIX

Kroger Earnings on Investment in Kentucky Assuming Accuracy of Morrill Figures for Sales and Earnings

	Sales[a]	Computed tax	Credits[b]	Net tax	Income before[c] sales tax	Income after sales tax	Investment in Kentucky[d]	Rate of earnings on investment	Investment in Kentucky adjusted	Rate of earnings on investment adjusted[e]
1930....	$14,653,448	$139,584.48	$15,369.00	$124,215.48	$172,892.93	$48,677.45	$1,756,000	2.8%	$1,438,721.46	3.4%
1931....	15,496,915	148,469.15	15,643.84	132,825.31	151,734.19	18,908.88	1,353,000	1.4	1,035,721.46	1.8
1932....	11,447,611	107,526.11	12,271.75	95,254.36	86,230.98	9,023.38*	1,076,000	0.8*	1,076,000.00	0.8*

[a] Morrill Deposition, p. 26.
[b] Sworn amendment to Bill of Complaint.
[c] Morrill Deposition, p. 27.
[d] Sworn statement to Kentucky Tax Commission quoted in Martin Exhibit VIII-A.
[e] The capital adjustment necessary as shown in Morrill No. 3, p. 5, is here reflected in data for 1930 and 1931, as well as in the figures for 1930. The adjustment was assumed to have taken place in Kentucky ratably with Kentucky sales, that is, 5.5 of the total for the company. The assumption is presumably only approximately accurate, but figures for 1932 indicate the substantial validity of the assignment.
*Loss

[fol. 552] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State

(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	1930	916,265	13,710	135,598	919	1.50	0.68
	1931	869,482	14,498	149,243	836	1.67	0.56
	1932	753,013	11,026	161,016	854	1.46	0.53
Kroger Grocery and Baking Co.	1930	267,664	14,653	60,781	1,756	5.49	2.89
	1931	244,371	13,497	58,260	1,353	5.52	2.32
	1932	213,160	11,448	53,002	1,076	5.37	2.03
S. S. Kresge Co.	1930	146,836	2,576	108,071	590	1.75	0.55
	1931	140,859	2,424	104,280	560	1.72	0.54
	1932	119,237	1,990	99,084	491	1.67	0.50
F. Q. Woolworth Co.	1930	289,289	2,276	145,646	452	0.79	0.31
	1931	282,670	2,230	145,123	452	0.79	0.31
	1932	249,893	1,934	139,559	419	0.77	0.30
J. C. Penny Co.	1930	192,944	2,236	69,126	561	1.16	0.81
	1931	173,705	2,170	71,443	585	1.25	0.82
	1932	155,272	1,961	64,752	421	1.26	0.65
Sears Roebuck & Co.	1930	395,133	1,119	296,071	133	0.28	0.04
	1931	363,453	1,282	300,636	140	0.35	0.05
	1932	299,341	1,890	297,069	135	0.40	0.05
Montgomery Ward & Co.	1930	75,353	1,086	34,740	431	1.44	1.24
	1931	60,497	808	26,564	287	1.34	1.08
	1932	54,916	713	19,596	213	1.30	1.09
W. T. Grant & Co.	1930	71,050	437	14,425	55	0.61	0.38
	1931	69,149	424	17,110	50	0.61	0.29
	1932	73,309	560	17,081	65	0.76	0.38
J. J. Newberry & Co.	1930	30,187	726	21,814	278	2.40	1.27
	1931	31,147	954	22,044	312	3.06	1.41
	1932	33,122	1,012	21,304	299	3.06	1.40
Walgreen Co.	1930	.....	.....	.....	.....	.....	.....
	1931	5,969	538	1,668	83	9.02	4.98
	1932	4,816	460	1,359	74	9.56	5.43
McCrory Stores Corporation	1930	43,224	330	36,457	196	0.76	0.54
	1931	43,296	320	34,408	186	0.74	0.54
	1932	.....	.....	.....	.....	.....	.....

[fol. 553] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State a
(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Mangels, Inc.	1930	9,987	371	2,747	34	3.72	1.23
	1931	9,357	326	2,258	31	3.48	1.38
	1932c	.....	.....	.....	.....	....	....
Melville Shoe Corp.	1930	28,654	353	7,776	87	1.23	1.12
	1931	26,287	339	9,144	61	1.29	0.67
	1932c	.....	.....	.....	.....	.....	....
S. H. Kress Co.	1930	19,206	327	15,229	53	1.70	0.35
	1931	20,972	261	16,214	124	1.24	0.76
	1932	19,084	220	15,736	122	1.15	0.77
G. C. Murphy Co.	1930	17,498	246	4,519	48	1.40	1.05
	1931	19,182	221	4,477	51	1.15	1.14
	1932	18,497	188	4,553	44	1.02	0.97
American News (Louisville News Co.)	1930	35,095	241	4,708	18	0.69	0.38
	1931	32,488	220	4,503	15	0.68	0.34
	1932c	.....	.....	.....	.....	....	....
Reliable Stores Corp.	1930	8,692	387	260	0	4.45	0
	1931	8,541	354	228	0	4.15	0
	1932	5,631	316	142	0	5.61	0
Jewel Tea Co.	1930	15,522	201	8,231	13	1.30	0.16
	1931	13,743	162	8,129	34	1.18	0.42
	1932	11,091	132	7,476	32	1.19	0.43
Edison Brothers Stores, Inc.	1930	4,912	256	1,591	52	5.22	3.26
	1931	6,423	286	1,825	41	4.46	2.23
	1932	8,018	243	2,000	22	3.03	1.09
Western Auto Supply Co.	1930b	.....	.....	.....	.....	....	....
	1931	12,433	90	5,414	15	0.72	0.28
	1932	11,798	84	5,670	12	0.72	0.22
Sterchi Brothers Stores, Inc.	1930	5,671	189	6,311	77	3.34	1.23
	1931	4,215	145	4,323	63	3.45	1.45
	1932	2,951	102	3,250	45	3.45	1.38
Childs Co.	1930	23,127	166	11,840	3	0.72	0.02
	1931	21,123	143	11,640	2	0.68	0.02
	1932	15,681	108	23,288	4	0.69	0.02
Lerner Stores Corp.	1930	25,293	129	7,129	5	0.51	0.08
	1931	26,077	101	6,190	5	0.39	0.08
	1932c	.....	.....	.....	.....	....	....
G. R. Kenny Co.	1930	17,852	71	9,148	30	0.40	0.33
	1931	14,024	65	5,935	27	0.47	0.46
	1932	11,869	52	5,402	18	0.44	0.32

a Source: Records of Kentucky State Tax Commission.
b Report Lost.
c Report in hands of Field Agent.

[fol. 554] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State a
(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
D. A. Schulte, Inc.	1930	19,898	68	22,021	5	0.34	0.02
	1931	17,968	55	22,693	5	0.31	0.02
	1932c	.....	.....	.....	.....	....	....
United Cigar Stores Co. of America	1930	74,486	78	22,087	10	0.10	0.04
	1931	63,163	55	20,310	10	0.09	0.05
	1932d	186	18	73	6	9.52	8.56
Feltman & Curme Shoe Store Co.	1930	6,161	74	2,019	11	1.20	0.54
	1931	5,349	88	1,070	8	1.64	0.76
	1932	4,379	77	1,009	9	1.76	0.93
Schiff Co.	1930	9,933	200	3,196	63	2.01	1.96
	1931	10,180	208	2,849	48	2.04	1.68
	1932	8,910	166	2,743	32	1.86	1.15
B. & G. Sandwich Shops, Inc.	1930	3,451	57	1,440	71	1.66	0.49
	1931	2,883	39	1,214	66	1.36	0.55
	1932c	.....	.....	.....	.....	....	....
G. F. Adams Co.	1930	2,708	41	415	6	1.53	1.43
	1931	1,856	23	1,498	18	1.22	1.22
	1932c	.....	.....	.....	.....	....	....
National Bellas Hess Co.	1930	29,646	153	11,849	56	0.52	0.47
	1931	27,431	160	8,694	54	0.58	0.63
	1932c	.....	.....	.....	.....	....	....
Federal Bake Shops of Missouri, Inc.	1930	402	34	45	5	8.45	11.55
	1931	323	28	38	5	8.76	12.02
	1932	213	22	31	4	10.18	14.39
Ground Gripper Shoes, Inc.	1930	1,228	24	748	10	1.94	1.34
	1931	1,179	17	446	8	1.46	1.78
	1932c	.....	.....	.....	.....	....	....
Nunn Bush Shoe Co., Inc.	1930	2,954	28	1,063	6	0.96	0.57
	1931	2,503	26	820	4	1.03	0.54
	1932	1,197	23	578	3	1.92	0.50
Metropolitan Chain Stores	1930	9,073	None	5,892	26	0	0.45
	1931e	.....	.....	.....	.....	....	....
	1932c	.....	.....	.....	.....	....	....

a Source: Records of Kentucky State Tax Commission.
b Report lost.
c Report in hands of Field Agent.
d Incorporated in Tennessee in 1932.
e No report field.

[fol. 555] MARTIN EXHIBIT No. X-A

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent—1930-31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	.75%	76	.7%
150,000– 299,000	64	.6	88	.6
300,000– 499,000	58	.6	81	.6
500,000– 749,000	51	.65	58	.6
750,000– 999,000	27	.5	35	.55
1,000,000–1,999,000	65	.4	75	.45
2,000,000–3,999,000	50	.4	67	.4
4,000,000–9,999,000	44	.4	54	.35
10,000,000 and over	27	.25	30	.3

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 556]

MARTIN EXHIBIT No. XI-A

Ratio of Taxes to Net Sales, Department Stores Independently and Centrally Owned, 1930*

Net sales	Doing no group buying		Doing some group buying		In ownership group	
	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	85	.75	50	.65	35	.65
500,000–2,000,000	42	.55	54	.55	38	.55
2,000,000 or more	33	.35	40	.35	61	.35

* As reported in Bulletin 85, Bureau of Business Research, Harvard University, pp. 38–40.

(Here follow tables, side folios 557, 558 and 559)

[fol. 557]

Correction of Summary of Martin Exhibit XII.

SUMMA

Total busines

Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate
$1,053,693–$33,767.....	30	$1,420,982	$220,214	$174,937
32,817– 15,543.....	30	276,720	34,553	28,144
15,176– 5,030.....	30	133,679	13,308	10,319
5,019– 1,140.....	29	44,147	3,615	1,589

557]
ection of Summary of Martin Exhibit XII.

SUMMARY SHOWING DATA IN AGGREGATE
(-000 omitted)

		Total business					Kentucky data assuming 5% of total in state					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio III/II	VI Ratio IV/II	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Kentucky gross sales tax at rates provided in statute	X Ratio VIII/VII	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio IX/VII
53,693-$33,767.....	30	$1,420,982	$220,214	$174,937	15.50%	12.31%	$71,049	$11,011	$8,873	15.50%	12.31%	12.49%
32,817- 15,543.....	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176- 5,030.....	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019- 1,140.....	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 560] MARTIN EXHIBIT XXX

Comparison of Kroger Taxes in Kentucky with Those to Which the Company Would be Liable if It Operated in Other States Having Similar Gross Sales Taxes *a*

	Gross tax	Offsets	Total taxes under sales tax Act	Sales tax per store
Kentucky *b*	$107,526.11	$12,271.75	$95,254.36	$382.55
Minnesota *c*	140,463.00	.....	140,463.00	564.11
Vermont *d*	413,466.94	182,253.34	231,223.60	928.61
New Mexico *e*			279,150.00	1,121.08

a The assumption is that the corporation sell the same amount and through the same number of stores as it did sell in Kentucky in 1932, as set out in the depositions of Albert H. Morrill, namely, $11,447,611 of sales in 249 stores, the credits for other taxes being $12,271.75 and property taxes paid, $169,971.59.

b Ky. Acts, 1930, chap. 149.

c Session Laws, 1933, chap. 213.

d Act approved March 25, 1933.

e Laws, 1933, chap. 73.

[fol. 561] MARTIN EXHIBIT XXXI

Comparison of Effective Tax Rates (Under Chap. 149, Ky. Acts, 1930) with Rate of Net Gain on Sales of Grocery and Variety Chains and of Department Stores

(Amounts in thousands of dollars)

	Range of sales	Number of enterprises	Average sales per enterprise	Average gain
Grocery Chains as computed *a*	Over 225,000	5	304,744	2.8%
	50,000–225,000	6	27,942	2.7
	Under 50,000	6	11,672	2.1
Grocery Chains (Harvard) *b*	Over 5,000	21	91,437	2.8
	750–5,000	30	1,724	2.2
	Under 500	31	404	0.9
Variety Chains *c*	Over 2,000	13	31,065	6.2
	500–2,000	7	1,267	3.0
	Under 500	13	205	0.4*
Department Stores *d*	Over 2,000	121	8,502	3.5
	500–2,000	143	1,096	1.9
	Under 500	187	253	0.9

* Loss.

a All grocery chains listed by Nystrom or in Martin Exhibit XII and reported in Moody are included and shown in three groups as nearly equal in number of chains as possible. The figures shown are thre-year averages, 1930–1932 inclusive, except in the case of U. S. Stores Corporation (1928–1930), the last reported, are used).

b Figures for 1929 as reported in Harvard Bureau of Business Research Bulletin No. 84.

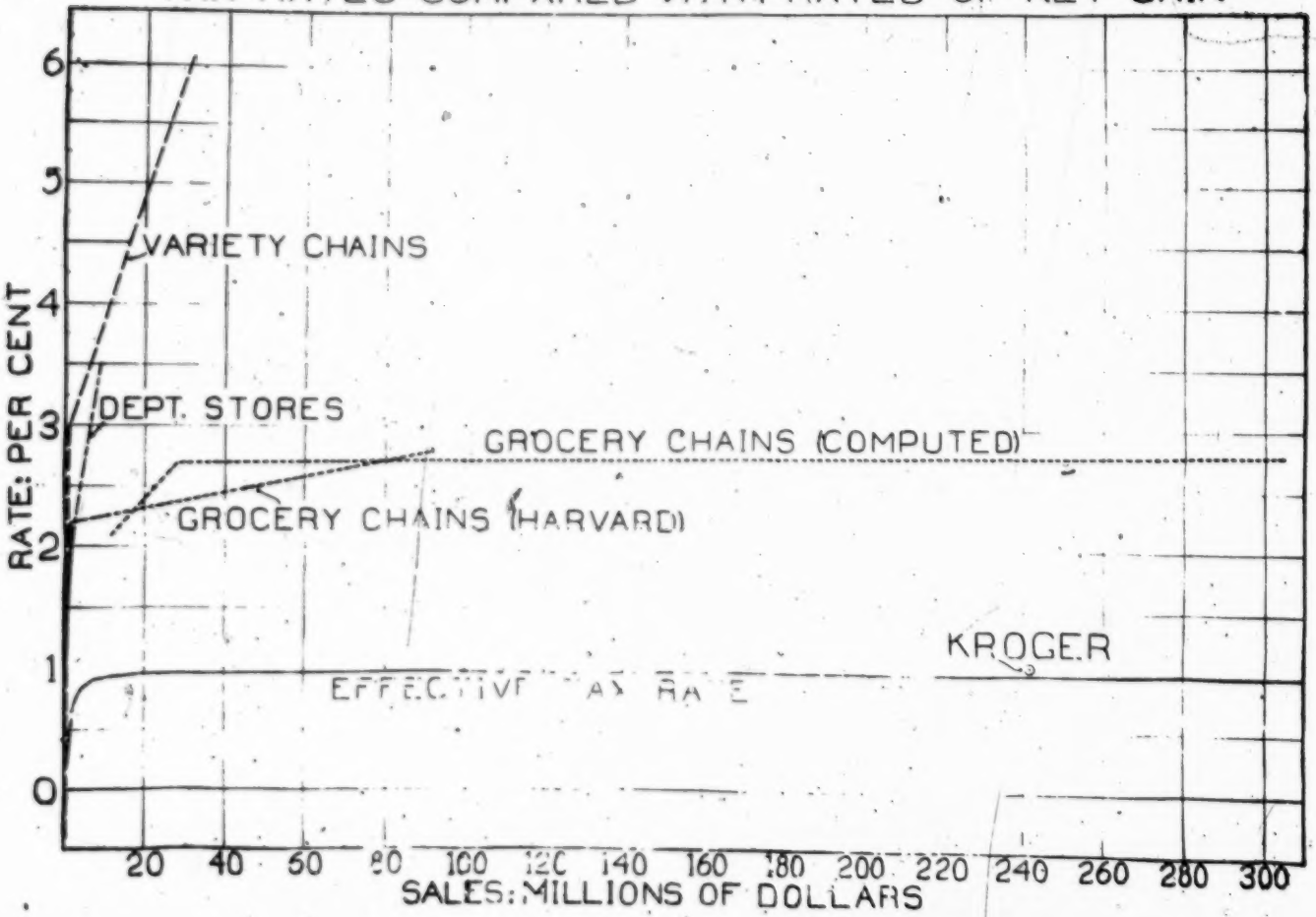
c Figures for 1929 and 1931 averaged on basis of data in Harvard Bureau of Business Research Bulletin No. 89.

d Figures for 1927–1931 inclusive averaged on basis of data reported in Harvard Bureau of Business Research Bulletin 85 and Bulletin 88.

(Here follow photolithographs of Martin Exhibit XXXI, side folios 562 and 563)

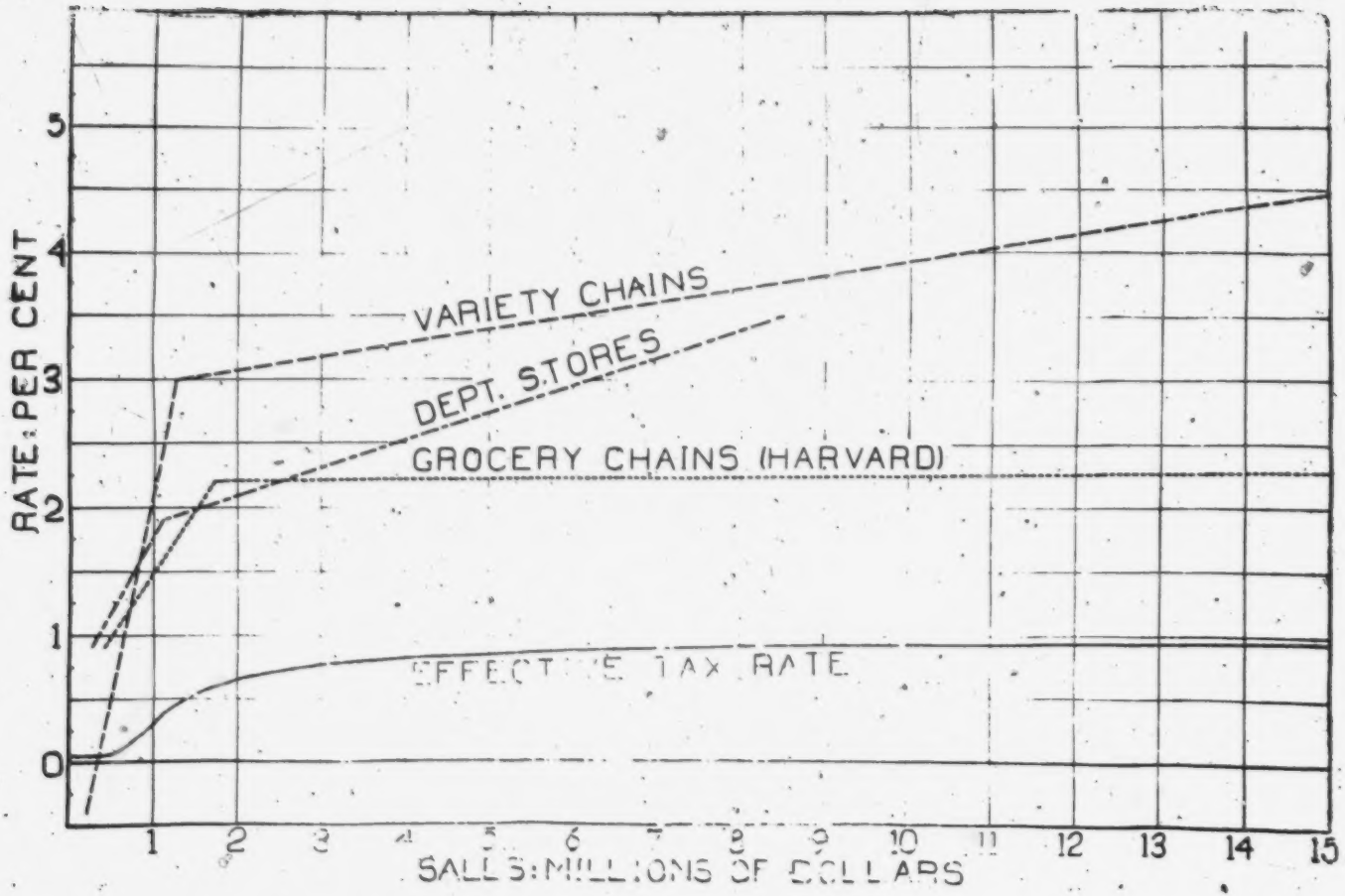
MARTIN EXHIBIT XXXI

TAX RATES COMPARED WITH RATES OF NET GAIN



562

3641A


RATE: PER CENT
0
1
2
3
4
5
VARIETY CHAINS
DEPT. STORES
GROCERY CHAINS (HARVARD)
EFFECTIVE TAX RATE
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
SALES: MILLIONS OF DOLLARS

563

3643

[fol. 564]. CLYDE WILLIAM PHELPS, called for defendant:

Witness stated that he was the same Clyde William Phelps who testified by affidavit in this case in 1931. He was a graduate of Harvard University, having received his Bachelor of Arts degree there. He also received the degree of Docteur of Laws at Toulouse University in France. He studied at Heidelberg and in Vienna. Since 1925 he had been head of the Department of Economics at the University of Chattanooga with the exception that in 1931 and 1932, for a period of little over one year, he served as economist on the Federal Trade Commission. He was familiar with the Harvard Bureau of Business Research studies and knew that they were authoritative publications. He was also acquainted with the United States Census Bureau of Retail Distribution reports. He was also familiar with publications on retail chains, with Bradstreet's Weekly, "Chain Stores," "Bjorklund and Palmer's Study of Prices of Chain and Independent Grocers in Chicago," and Alexander's "Study of Retail Grocery Prices"; Dowe's "Comparison of Independent and Chain Store Prices," which appeared in Journal of Business; "Chain Store Progress Magazine"; "Fairchild's Financial Manual" and "Retailing Magazine," all of which publications he regarded as authoritative in their fields. Chain Store Industry he thought contained propaganda, since it advertised the prices of large chains and compared them with independents for the purpose of indicating how the chain stores sell goods at a cheaper price. It is the outstanding organ of the industry.

Witness thought that it was pretty generally recognized that there was a relationship between the size of the establishment as measured by volume of sales and efficiency as indicated by its percentage of expenses and its net profit, etc. He thought the theory was pretty well established regarding this point. One could find it substantiated throughout the text books and economic literature. Inves- [fol. 565] tigations made by other government organizations have supported the theory that as the establishment grows in size, measured by volume of sales, it tends to show more and more advantages over the smaller establishment. That is the result of certain economic principles, certain principles of law in physiology, chemistry and biology, which prevail in the natural and physical world.

Among economic principles, there is the principle of indirect cost and the principle of division of labor, which tends to bring about that result that as establishments grow in size as measured by volume of sales, it tends to increase their advantage over smaller firms. The United States Censor's Report shows that among chain store businesses the smaller chain is less effective as measured by volume of sales. They have higher expenses and pay out a higher proportion of their total income from sales for wages and etc. than do the larger ones. The law does not work out perfectly with mathematical precision but it is rare that one finds any theory working out perfectly specially over a short period of time like twelve months or two or three years. However, the tendency is there. This is widely supported by economic theorists. One can go to a multitude of economic text writers and recognized teachers in the United States and one will find the theory supported and the fact has been discussed and published by impartial organizations like those operated by the United States government. The witness stated that he would say offhand, that big undertakings appear at an advantage compared with small ones. Big chains as measured by volume of sales appear at an advantage as compared with establishments having smaller sales. Big department stores appear at an advantage as compared with small department stores. The tendency is there.

Witness thought that it follows from this that the large scale retailer had greater tax paying capacity than the smaller retailer in the same line. This was so for two reasons. First of all, the rate of profit tends to increase as the establishment increases in size. That gives increased [fol. 566] tax paying capacity and more than a proportional increase. Consequently, the very fact that the large establishment has a large income, as compared with the smaller establishment would give it an increased taxpaying ability.

Witness stated that it had always seemed to him in theory that the independent cooperative in the so-called voluntary chain had a pretty good chance to rival the chain stores. In other words, by theorizing one can assume that the independents would get together and do this and that, etc., and working it out to the end of the theory it would seem as if they could accomplish all the things and that they will make a pretty close approximation to the efficiency of the real chain, that would be the result, but in practice, the volun-

tary group do not appear to equal the efficiency of the chain, the main reason for that being the lack of centralized ownership and control. The one great advantage that the real chain has is that it owns every one of the units. Ownership is centralized, each of the units does what it is told to do. On the other hand, in the voluntary group of independents, each one owns his own store. He can buy through the central organization if he wants to, but witness did not know of any case where the merchant bought everything through the centralized office. The member of the voluntary group can follow the advice of headquarters but does not have to do so. The real chain system is a more or less military organization. Every unit operates in the most efficient manner as determined by the central headquarters, which is able to employ the highest skill. On the other hand, the voluntary group instead of having a military organization, so to speak, at central headquarters, must coax the independent to carry out the scheme. That is not a simple democratic from of organization but it is not as efficient as an autocratic system.

Witness had experience in working closely with wholesalers starting a voluntary chain and he knew from them, as well as from literature on the subject, the difficulty in- [fol. 567] volved in persuading the various independents to carry out the policy made by headquarters, such as keeping their stores clean, keeping their shelves covered with brass tacks, and carrying out sales policies announced by headquarters. Witness further stated that he might refer to the Federal Trade Commission studies on Cooperative Grocery Chains. In that study it was pointed out that the voluntary groups of independents were not able to achieve the efficiency of the regular chain, that they could not distribute merchandise as efficiently.

Other studies had been made, some of them appear in the Chain Store Progress, which bore out that point. Professor Martin had made a study several years ago in Lexington. All of the studies bear out the fact that the voluntary groups do not achieve the efficiency in marketing their goods that the regularly centrally owned and controlled chain stores do.

Insofar as an independent retailer not operating as a voluntary member of a group is concerned, he cannot secure the efficiency of a centrally owned and managed chain. A few exceptions may be discovered where there is an extra-

ordinary genius among independent merchants who is able to compete satisfactorily with the centrally owned and controlled chain and even undersell them, but in general the independent retailer who is operating alone is worse off than the voluntary groups in trying to meet the competition of the centrally owned and organized chains. This is because the large scale establishment tends to have certain advantages in buying and selling, production, financing, and general management which can only be achieved by a large selling firm.

The small retailer usually fails to find himself with a managing genius to run his store. He cannot have the services of a $25,000 or a $50,000 or a $100,000 a year specialist. Yet that same specialist can be hired by a great store or establishment with a tremendous volume of sales and pay the $25,000 or $100,000 and make a tremendous profit out of his employment.

[fol. 568] As an example from another field, the International Harvester Company installed years ago a certain specialized machine to do nothing except to round off the four corners of a wagon tongue. That machine, it was reported, saved them a penny a tongue. The only way by which its use was possible at a profit was by turning out a tremendous volume of tongues. A small plant might have bought that machine and lost money because that small plant did not have enough business to utilize this very efficient machine. So in big retailing establishments, the volume of business makes it possible to hire the very highest type of managing ability and to get such results out of that ability as to make it relatively cheap.

Management plays a large part in the success of a retail establishment. The smaller plant cannot afford the high-class management which the larger establishment secures.

Those operating large retailing establishments are able to buy in large quantities and secure extra discounts because they buy in those large quantities. This is reflected in profits. There are also other advantages. A large establishment has other methods of capitalizing upon its buying of supplies. It gets all of the discounts which the smaller establishment can get and in addition to that another discount, and sometimes it is large enough to be able to secure special deals for itself.

Witness stated that he was one of the economists who helped write the Federal Trade Commission reports, and

besides his work in Washington upon schedules on information involving chain store organizations and independents, he visited the headquarters of the largest chain in the country in a number of lines of business and in some cases arrangements were made with officials for him to go around with the supervisor or superintendent and he was permitted to spend an entire day accompanying them in their visits to stores and asking questions as to how they supervised and how the stores were running. He secured a great deal of interesting information directly that way, from actual [fol. 569] contact with the chains and with the officials. Witness did not know of any reason why the economic principles about which he had testified would not be effective in Kentucky the same as elsewhere. Economic laws, he stated, did not stop at State lines.

Cross-examination:

Witness had made no examination of the actual operation of the Kentucky Gross Sales Tax Law as it applied to the various taxpayers to whom the law presumptively applied.

SELDON R. GLENN, called for defendant:

Witness is collector of internal revenue for the District of Kentucky and has held that position for ten days prior to July 20, 1933 the date on which testimony was taken. Prior to that time he had been State Tax Commissioner for about ten years. As such, it was his duty to become familiar with the income and expenditures of the State Government. He was also familiar with the taxing laws of the State.

All taxes on personal property, all license taxes of every description make up the general expenditure fund. Between $6,000,000 and $8,000,000 of tax money was due the Commonwealth of Kentucky, which funds would go to the credit of that general expenditure fund when collected. These funds were in the process of collection at the time the testimony was given and witness stated there were no preferred claims against the fund. While the witness was State Tax Commissioner there were some refunds of taxes collected. It was the duty of the State Tax Commissioner to approve or reject refunds for inheritance taxes, license

taxes, and whiskey taxes. A refund was made on whiskey of about $300,000 and the refund of more than that amount was made on inheritance taxes. The month preceding the time the testimony was given a refund of $140,000 on license taxes on beer was made.

[fol. 570] All of the refunds were made by check. It would be possible for the State Treasurer to refund any amount up to $5,000,000 to any person who improperly paid taxes within a reasonable time after such refund was ordered if the refund was made a preferred claim against the general expense fund. This statement of the witness was objected to by counsel for the plaintiff.

Refunds have always been treated as preferred claims. The question which led to this reply was objected to by counsel for complainant on the ground that it was a question of law whether the refund was entitled to preference.

Money comes into the general expenditure fund gradually.

Cross-examination:

Witness recalled testifying in the Franklin Circuit Court in the case of Lebus vs. Ruby Laffoon, Governor, et al., on May 23, 1932, which involved the validity of the $14,000,000 proposed bond issue. In that case he was called upon to estimate the amount of taxes that might accrue to the State under the gross sales tax law which was the subject matter of the instant case. Witness' recollection was that he estimated that the State would realize about $500,000 a year from the gross sales tax law. Witness' recollection was refreshed by reference to the answer which he gave which read as follows:

"There is the litigation which is known as the gross sales tax, which has been won in the district federal court and the circuit court of appeals and is now before the Supreme Court of the United States, which involves $400,000 of past due taxes and about $400,000 more which will be due during the next biennial period and the amount of that tax would lessen, etc."

Witness recalled making this statement.

The last call for interest bearing state warrants was issued by the State Treasurer in February, 1933. Witness did not know whether any warrants issued since July, 1927, had been called for payment. During the year 1932 the range in

price of interest bearing state warrants drawn against the general expenditure fund ran from eighty-three to ninety-three. During 1932 it was around ninety.

[fol. 571] Tax refunds during the past few years have been made when presented.

R. C. ILG, called for defendant.

He is manager of Ernst and Ernst, public accountants and is — charge of the Louisville branch. As such he was consulted by the State Tax Commission of the State of Kentucky with reference to making a survey of the books of the Kroger Grocery & Baking Company. On June 20, 1933, his firm was employed to make a survey of the Kroger Grocery & Baking Company to determine the amount of work necessary to arrive at the various figures testified to by Mr. Morrill. The survey was not made. Representatives of his office discussed the matter with the Tax Commission and spent two days in Cincinnati for the purpose of making the survey. On June 22, in connection with Mr. MacArthur, manager of the Cincinnati office, representatives of his firm called on Mr. Ginter of the firm of Nichols Morrill Wood Marx & Ginter, counsel for the Kroger Company who took them over to the general office of the company and introduced them to Mr. Clark, the chief accountant. They discussed the purpose of their visit with Mr. Clark and he furnished them with all the information that they thought was necessory and after looking at the records by four week periods, and various details of the operation of the various Kroger Grocery and Baking Company stores, particularly those branches controlling the operation of Kentucky stores, the examination disclosed that Kroger had five branches doing business in Kentucky. These were located at Carbondale, Ill.; Charleston, W. Va.; Cincinnati, Ohio; Louisville, Ky.; and Nashville, Tenn.

The records that they examined of the general office reflected only the operation of these various stores that were handled at the branches mentioned. For example, the Cincinnati branch office controlled the stores operated in Cincinnati, Hamilton, Covington and Newport and nearby districts. From their examination of the records that were submitted, they could not determine just what the Ken-

tucky stores as a whole were doing in the way of operation. This was one of the purposes of their visit, to determine [fol. 572] what break-down was necessary. By break-down witness meant analysis of sales and various expenses for the purpose of showing gross profits, net profits, etc. They did not go into detail of stores operated 1930, 1931, and 1932, but at the close of 1933 Kroger was operating 249 stores out of the various branch offices, 165 of which had meat departments. The operations in the meat departments were detailed just the same as the store operation. That meant that the witness had 414 store operations to analyze. Out of all the stores over which the Cincinnati branch had supervision, there were 75 located in Kentucky over which the branch had jurisdiction. The same thing applied to Louisville. That branch had charge of stores located in Indiana. It supervised 152 stores doing business in Kentucky, 101 of which had meat departments.

Operating statements made up by Kroger would show grocery sales, cost of sales, gross profit, and the meat department would contain the same information. The statement would also show total sales of both departments and gross profits of both departments. The classification covering grocery expenses then follows and there was deducted the grocery expenses from grocery profits. To the grocery and meat departments are applied certain general expenses under the classifications, fixed expenses, total store expenses, and other expenses. The stores are charged with branch operating expenses and branch overhead expenses. Branch overhead includes general expenses, supervisory expenses, transportation expenses, warehouse expenses, sales promotion, advertising, purchasing expense, and administrative expense. They estimated 128 accounts represented in every store operation and his firm further estimated that it would take five men at the Cincinnati branch, five at Louisville, two in Carbondale, and possibly one at Memphis approximately forty days to gather up the detailed information and possibly ten or twelve days to compile the data. The cost would run approximately $8,000 to $10,000. When the State Tax Commission was advised of the expense they determined to hold the matter in abeyance.

[fol. 573] ELAM HUDDLESTON, called for defendant:

He is the Treasurer of the State of Kentucky, having taken office January 4, 1933. His term will expire, January, 1936. As Treasurer he is the disbursing officer of the Commonwealth. All checks given for the State government are written in his office under his directions. Since he has been Treasurer there have been refunds made to persons who pay taxes, when in fact no taxes were due. These refunds were made in cash.

Witness thought that the $1,000,000 which was the approximate amount of the claims from the State which the plaintiffs would be entitled to in the event they paid and prevailed in a later action, could be refunded immediately. He has impounded or places in escrow all funds of appreciable amount so that he can refund them when the court decides that the payment was wrongfully exacted. This is what he did with the beer money. He impounded it when it was paid and paid it back immediately. So far as he has observed, the general custom of the State with reference to paying refunds has been cash. Recently he had made refunds in the neighborhood of $200,000. Other refunds have been made from time to time and they are being constantly made.

Seen and approved.

S. H. Brown, Ass't Att'y Gen'l.

[fol. 574] IN UNITED STATES DISTRICT COURT

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges.

OPINION—Filed December 20, 1933

DAWSON, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis, et al., in the Eastern District of Kentucky,

and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

[fol. 575] "The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed the practice of keeping himself in financial position to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were

outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Supreme Court as [fol. 576] to whether Section 10 of the Act authorizes such preferential treatment, and in view of the further fact that if refunds under the Act are not given preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant', as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining, of any store or stores, as defined

herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four Hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five Hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) [fol. 577] Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) — and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from

such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

SECTION 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax [fol. 578] levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the inalienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it violates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000,000, and that this section also operates to give a preference [fol. 579] to those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further than that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property, or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment,

provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation as well as property taxation: It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the "purposes and poli- [fol. 580] cies of taxation." Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster-Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as inability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further, we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon [fol. 581] mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that

it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes, amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speak- [fol. 582] ing, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously oppoesd by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the

exclusion of the other is not reasonably founded in the "purposes and policies of taxation," or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion.

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special [283] license taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against

them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collection of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

[fol. 584] Does the Act Deny Due Process under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process of Congress under the Fifth Amendment is most helpful, because it is well settled that the restraint imposed upon State Legislatures by the due process clause of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation

of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, [fol. 585] that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation trangresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00

of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that [fol. 586] the taxpayer in the higher brackets gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of that company have been so improved that for the first six months of the year 1933 the net profits amounted [fol. 587] to $2,294,000, as compared to substantially $1,475,000 for the entire year 1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932;

and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof fails to establish that in its application to those in the higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the court.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky. 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact [fol. 588] can have no effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made

in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or is it Unauthorized by Section 181 of That Instrument?

The tax involved here must find its justification in Section 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lines, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business or to resort to unreasonable classification in taxation. Fiscal Court of [fol. 589] Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights contained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to

appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable trial the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we feel constrained to leave these cases on the docket, without prejudice to the right of the plaintiffs, after such reasonable trial, to apply to this Court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Xen. Hicks, U. S. Circuit Judge. Chas I. Dawson, U. S. District Judge.

Judge Cochran dissents.

December 20, 1933.

[fol. 590] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio, Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 591] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed May 22, 1934

COCHRAN, J.:

I feel constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case

here. The tax imposed for sales amounting to $400,000.00 is $200 and for those amounting to $1,000,000.00 plus is $10,000.00. The percentage of step-up in volume was 250—in tax imposed 5,000 per cent, or twenty times as much.

In the case of City of Newport v. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up in volume was 33⅓ per cent and in tax 1,000 per cent or [fol. 592] thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs vs. Jackson, 283 U. S. 527. It was emphasized in Liggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which make for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed per volume of sales. So here is seems to me that it was

arbitrary and unreasonable not to treat singly operated units, department stores and chain stores differently in the [fol. 593] rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act. The returns for the year 1930, 1931, and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking [fol. 594] Company and the Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross

sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00. Of these 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this State was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, in that it excepts from its provision retail merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the [fol. 595] tax. The plaintiff, The Kroger Grocery & Baking Company, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state." The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not 'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstances of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This is a [fol. 596] case, as I see it, where this court is not bound to follow the state court in its construction of the Act. It is governed by the statement on this subject in the case of Edward Hines Trustees v. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the court to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a reasonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state

it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient for that purpose. Sections 4688-1 to 4688a-2 and 4689, Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be [fol. 597] found in the case of Talbott, Auditor, vs. Childers, Executor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Ex'ors, 250 Ky. 143.

Section 10 of the act here involved expressly authorizes the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor,

there is always sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

[fol. 598] IN UNITED STATES DISTRICT COURT

MOTION FOR FINDINGS AND CONCLUSIONS—Filed December 26, 1933

The plaintiff in each of the above-styled cases, by counsel, moves the Court, before entry of a decree herein, to find the facts specially upon which its decree is based and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions, all as provided by Equity Rule 70½ as expounded by the Supreme Court in Pub. Serv. Com. v. Wisconsin Tel. Co., 289 U. S. 67, at page 69; Tax Comm'rs v. Jackson, 283 U. S. 527, at page 533.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

Have seen—12/26/33. H. W. Batson.

[fol. 599] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 21, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 600]

Date	Balance to credit of general fund		Outstanding warrants against general fund
6/30/1922	$297,967.85		$4,702,709.11
6/30/1923	2,590,470.14		5,947,750.40
6/30/1924	167,535.74		4,089,151.37
6/30/1925	310,242.68		4,127,746.17
6/30/1926	10,387.44		4,329,772.33
6/30/1927	257,566.83	(deficit)	4,664,820.89
6/30/1928	440,328.14		6,715,347.99
6/30/1929	1,880,084.77		8,060,920.69
6/30/1930	1,826,244.05		8,533,394.79
12/31/1930	1,250,168.22		9,880,501.76
6/30/1931	2,440,128.46		11,023,911.53
12/31/1931	838,269.63		12,637,990.48
6/30/1932	1,302,267.69		13,851,414.57
12/31/1932	573,831.32		14,415,403.69
5/25/1933	1,898,229.25		14,668,744.57
7/30/1933	.....		15,197,005.42

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing, they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have sold below par, the price at items being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform [fol. 601] practice of the Treasurer who has been in office at all times since the passage of the Act in question, and he

has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treasurer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four.....	$100,000	Rate of	1/20	of	1%	,	or	a	tax	of	$200.00
Fifth.....	$100,000 of sales	"	2/20	"	"	"	"	"	"	"	100.00
Sixth.....	$100,000 of sales	"	5/20	"	"	"	"	"	"	"	250.00
Seventh.....	$100,000 of sales	"	8/20	"	"	"	"	"	"	"	400.00
Eighth.....	$100,000 of sales	"	11/20	"	"	"	"	"	"	"	550.00
Ninth.....	$100,000 of sales	"	14/20	"	"	"	"	"	"	"	700.00
Tenth.....	$100,000 of sales	"	17/20	"	"	"	"	"	"	"	850.00
Eleventh.....	$100,000 of sales	"	1%					"	"	"	1,000.00
On each.....	$100,000 of sales hereafter, 1%										

[fol. 602] 3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3.; playing cards $10.00; pistols $10; bowie knives, dirks, etc. $100; etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

Amount of sales	Total tax payable	Effective rate
$400,000	$200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

[fol. 603] 7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants (25 in number), who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

	Number of returns	Gross sales	Net tax
Sales less than 400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the Act on the business of those merchants who have posted bond, made no report and paid no tax.

[fol. 604]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933;

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,457.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	.....
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	.....
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

[fol. 605] 10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery & Baking Company operated 5,302 stores in the United States in 1930; 4,980 stores in 1931, and 4,816 stores in 1932. Of this number 289 were located in Kentucky in 1930; 254 in 1931, and 249 in 1932. [fol. 606] The average annual sales per store of the Kroger Grocery & Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger Stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00.

18. The retail sales of Kroger in the United States for the years, 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the

expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and in [fol. 607] some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky, with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protec-

[fol. 608] tion of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities and Corrections, 239 Ky. 729

1. The case of Moore v. State Board of Charities & Corrections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the act, [fol. 609] and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunctions.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeal of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of an opportunity to make a reasonable profit in their business.

2. The Kroger Grocery & Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931, and 1.15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the operation of that company under reasonably efficient management. For the first six months of 1933, under the management of Mr. Morrill, who became president of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

[fol. 610] Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

——, 1934.

[fol: 611] IN UNITED STATES DISTRICT COURT

Equity No. 609

ORDER AND DECREE—Entered June 19, 1934

This cause, having been heard on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on December 20, 1933, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on December 26, 1933, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934 by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

[fol. 612] I

(1) Complainant's motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now files herein its findings of fact and its conclusions of law and orders same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by the Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the mo-

tion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainant's said motion of that date, is hereby overruled; to which the complainant excepts.

(3) In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein ——, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

II

Pursuant to its opinion filed herein December 20, 1933, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainant is without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied: to which ruling the defendants except.

(2) That complainant take nothing by its bill of complaint as amended herein; that on final hearing upon the merits same is dismissed; and that defendants recover of [fol. 613] complainant their costs herein expended; to all of which the complainant excepts.

(3) That complainant having this day stated in Court its intention to appeal from this decree insofar as it denies the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein December 20, 1933, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainant and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainant, and such interlocutory injunction shall remain in full force as to the complainant and each of said taxpayers so listed, until the final determination of complainant's said appeal: to all of which the defendants except:

Provided, however, that the complainant, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated [fol. 614] taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainant or any one of said taxpayers shall fail to execute such bond or to give such security as is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dissolved as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainant or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and

effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

June 19, 1934.

Have seen.

Trabue, Doolan, Helm & Helm, of Counsel for Plaintiff. S. H. Brown, Ass't Att'y Gen. Ky., H. W. Batson for Defendants.

[fol. 615] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—Entered July 17, 1934

This 17th day of July, 1934, came the parties in the above styled cause, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed in compliance with the order and decree of this Court entered herein June 19, 1934, conditioned as therein provided to secure the Commonwealth of Kentucky on account of its claim for taxes for the year 1933, together with interest, court costs and all other proper charges that may accrue thereunder.

J. C. Penney Company, in the amount of $13,000.00.
Kaufman-Straus Company, in the amount of $8,000.00
Levy Bros. in the amount of $2,600.00.
H. P. Selman & Company, in the amount of $1,500.00
Hook Drug Company, Inc., in the amount of $240.40.
Byck Bros. & Company, Inc., in the amount of $153.35
J. Bacon & Sons, in the amount of $4,002.33.
Montgomery Ward & Co., Incorporated, in the amount of $2,000.00.
The Stewart Dry Goods Co., in the amount of $20,000.00.
Ben Snyder, Incorporated, in the amount of $5,960.00.
Lerman Brothers, in the amount of $3,600.00.

Chas. I. Dawson, Judge.

Have seen.

S. H. Brown, Assistant Attorney General.

July 17, 1934.

[fol. 616] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 12, 1934

The plaintiff, The Stewart Dry Goods Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiff for such interlocutory injunction and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiff a permanent injunction or any injunctive or other relief, hereby appeals to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

Plaintiff prays that said appeal be allowed and that a [fol. 617] citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before its Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

Nichols, Morrill, Wood, Marx & Ginter, Traube, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 618] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 12, 1934

The plaintiff, by counsel, respectfully represents that in the record and proceedings had in the above-entitled cause and in the rendition of the decree herein appealed from

there is manifest error, for which said decree should be reversed, and as cause for such reversal the plaintiff makes the following assignments of error:

1. The Court erred in failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants hav- [fol. 619] ing a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonble and arbitrary exaction of taxes from plaintiff and other retail merchants in like situation, at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates, or not taxed at all, by reason of credits or deductions allowed them—all in disregard of capital invested by the taxpayer, or of his ability to pay, or of his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales or greater exemptions, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the enactment of the challenged Act might be sustained upon a mere academic

[fol. 620] theory of economists in classifying property for taxation, when the facts shown in the record and the actual results in operation of the law demonstrate (a) that such theory is fallacious and (b) that there is no reasonable relationship between the assumed theory and the varying rates of taxation prescribed for the several classifications made under the challenged Act.

4. The Court erred in failing to hold that there was no reasonable relationship between the "step up" or increase in rates of taxation levied by the challenged Act, on the one hand, and the claimed tendency of profits to increase with increased sales, regardless of capital investment, management, or other factors, on the other hand.

5. The Court erred in finding that there is a taxable relationship between sales volume and net earnings.

6. The Court erred in failing to hold that the classification of all retail merchants in one general class, including therein chain stores, department stores, mail order houses and singly-operated units, of whatever character, with subclassifications thereof and varying rates of taxation thereon, based on volume of sales alone, was arbitrary, unreasonable, vindictive and capricious.

7. The Court erred in failing to hold that the increases in rates imposed and taxes levied by the challenged Act in its higher brackets for taxation were out of all proportion to any actual or claimed increases in percentages of net profits to sales in such brackets respectively, and varied so greatly as to be arbitrary an unreasonable.

8. The Court erred in failing to hold, upon the evidence adduced, that the challenged Act, in its actual operation [fol. 621] and effect, exempts, wholly or substantially so, from the the burdens of taxation levied by said Act, retail merchants who compete with plaintiff in the same or similar lines of business but who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

9. The Court erred in failing to hold that the challenged Act denies to the plaintiff the equal protection of the law in that it unjustly and unreasonably discriminates against the plaintiff by reason of the facts found by the Court (except the mere computation of plaintiff's taxes under the Act) as follows: that plaintiff, for the taxable years of 1930, 1931 and 1932 had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Taxes	Deduction
1930	$3,209,717.39	$25,147.17	$1,279.11
1931	3,618,126.00	29,231.26	1,407.85
1932	2,812,683.00	21,176.83	1,347.40

whereas for said years respectively a vast number of other retail merchants, many of whom actually and actively compete with plaintiff, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24163	$362,848,264.00	$106,342.94
1931	20382	310,467,073.00	85,136.99
1932	14597	186,313,016.81	42,916.69

10. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, re- [fol. 622] ported in 239 Ky. 729, was binding upon the Court as to the construction of the challenged Act and in then refusing to adopt the construction attributed by that decision to the challenged Act.

11. The Court erred in failing to hold that the challenged Act, according to the construction approved by the Court, denies to the plaintiff and others similarly situated the equal protection of the law in that, as so construed, it exempts from its operation merchants selling farm products raised by them, and therefore exempts The Kroger Grocery & Baking Company, together with other taxpayers, but applies to plaintiff and others doing a similar business.

12. The Court erred in failing to hold that the challenged Act is a burden on interstate commerce by reason of the fact that it taxes the sale by plaintiff to its customers resident in other States who buy merchandise (a) personally or (b) by telephone message or mail sent from such other State of the customer's residence, for delivery, in each of

the cases herein mentioned, to such customer at his residence in such State other than Kentucky.

Prayer for Reversal.

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiff prays that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 623] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered September 12, 1934

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeal to the Supreme Court of the United States for the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court [fol. 624] of the United States within thirty days from this date as provided by law.

4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming

the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

Xen. Hicks, United States Circuit Judge. Chas. I. Dawson, United States District Judge.

Sept. 12, 1934.

[fols. 625 & 626] Bond on appeal for $1,000.00 approved and filed Sept. 12, 1934, omitted in printing.

[fols. 627 & 628] Citation in usual form, showing service on Bailey P. Wooton et al., issued Sept. 12, 1934, omitted in printing.

[fol. 629] IN UNITED STATES DISTRICT COURT

STIPULATION AND PRÆCIPE—Filed September 20, 1934

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. The record from this Court as printed for use of the Supreme Court on the former appeal of this case.
2. Mandate from Supreme Court with order filing same.
3. Order entered December 10, 1932.
4. Order amending interlocutory injunction.
5. Amended Bill.

6. Answer to Amended Bill.
7. Second Amended Answer.
8. Stipulation as to evidence on final hearing.
9. Order substituting Emerson Beauchamp as a party defendant.
10. Order of submission.

[fol. 630] 11. Order filing tax return of D. T. Bohon Co. and said return.

12. Narrative of Testimony.
13. Opinion of Judge Hicks and Judge Dawson.
14. Dissenting opinion of Judge Cochran.
15. Motion to find facts.
16. Findings of fact and conclusions of law.
17. Decree.
18. Order approving bonds.
19. Petition for appeal.
20. Assignment of errors.
21. Order allowing appeal.
22. Appeal bond.
23. Citation and endorsement of accepted service.
24. This Stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trahue, Doolan, Helm & Helm, Solicitors for Plaintiff. B. P. Wootton, Attorney General, Solicitor for Defendants; S. H. Brown, Ass't Att'y Gen.

[fols. 631-634] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 635] Supreme Court of the United States

Statement of Points to Be Relied Upon and Designation as to Printing Record—Filed Oct. 9, 1934

Statement of Points

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this

Court in this case are that the United States District Court for the Western District of Kentucky erred in the rendition of its final decree and in dismissing appellant's bill of complaint, in the following particulars:

Point 1. In failing to hold that the Challenged Act, Chapter 149 Session Acts of 1930, designedly discriminates against and denies to appellant and to other retail merchants similarly situated the equal protection of the laws, for the reason that the Challenged Act imposes upon the appellant and other retail merchants similarly situated a grossly excessive and disproportionate tax burden and at the same time wholly or partially exempts from the burdens of said Challenged Act the vast majority of other retail merchants competing with appellant and engaged in the same business, and for the further reasons specifically set forth in appellant's assignment of errors numbered 1, 2 and 9.

[fol. 636] Point 2. In failing to hold that the Challenged Act is, by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrary, unreasonable, vindictive and capricious, as specifically set forth in assignment of errors numbered 3, 4, 5, 6, 7 and 8.

Point 3. In failing to hold that the Challenged Act denies to appellant and other retail merchants similarly situated the equal protection of the laws for the reason that said Act as construed by said Court exempts from its operation merchants selling farm products raised by them but applies to appellant and others similarly situated as specifically set forth in assignment of errors numbered 11.

Point 4. In failing to hold that the Challenged Act is a burden on interstate commerce for the reasons specifically set forth in its assignment of errors numbered 12.

The Stewart Dry Goods Company, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above list of points to be relied upon by appellant in the Supreme Court of the United

States of America is hereby acknowledged and accepted on behalf of the several defendants and appellees.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown, Assistant Attorney General.

[fol. 637] DESIGNATION AS TO RECORD

Comes now the appellant in the above-entitled case and states that in its opinion the whole record as filed is necessary for consideration of the case excepting the following, which may be omitted:

1. Opinion of District Court filed December 9, 1931 (Printed Record, page 236).
2. Order approving bonds (Printed Record, page 246).
3. Stipulation re substitution of J. Dan Talbott (Printed Record, page 247).
4. Petition for appeal—on first appeal (Printed Record, page 248).
5. Assignment of errors—on first appeal (Printed Record, page 250).
6. Order allowing appeal—on first appeal (Printed Record, page 258).
7. Stipulation re Transcript of Record—on first appeal (Printed Record, page 259).
8. Statement of points to be relied on—on first appeal (Printed Record, page 260).
9. Statement of portion of record to be printed—on first appeal (Printed Record, page 264).

[fol. 638] 10. From the narrative of testimony the evidence of the following witnesses relating solely to the adequacy of the remedy at law:

W. P. Sullivan (typed narrative, page 1),
Jerry King (typed narrative, page 39),
Selden R. Glenn (typed narrative, page 70),
Elam Huddleston (typed narrative, page 74).

The Stewart Dry Goods Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky. Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

[fol. 639] [File endorsement omitted.]

[fol. 640] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF PORTION OF RECORD TO BE PRINTED BY CLERK—Filed Oct. 9, 1934

Come now the appellees, in the above entitled case, and state that, in their opinion, in addition to those parts of the record designated by the appellant, there should be printed for consideration of the Court:

1. Opinion of the District Court filed December 9, 1931 (Printed Record, page 77.)

2. From the narrative of testimony the evidence of the following witnesses:

W. P. Sullivan (typed narrative, page 1),
Jerry King (typed narrative, page 39),
Seldon R. Glenn (typed narrative, page 70),
Elam Huddleston (typed narative, page 74).

[fol. 641] John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky. Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the appellant and appellees mentioned hereinabove.

The Stewart Dry Goods Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stitis, Solicitors.

[fol. 642] [File endorsement omitted.]

Endorsed on cover: File No. 39,082. W. Kentucky, D. C. U. S. Term No. 454. The Stewart Dry Goods Company, Appellant, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. Filed No. 454, O. T., 1934.

(5739-C)